SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 14

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN, APPELLANTS

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1956

[fol. 1] **IN THE COURT OF COMMMON PLEAS FOR FRANKLIN COUNTY, OHIO**

No. 189395

[Caption Omitted]

PETITION FOR WRIT OF HABEAS CORPUS—March 1, 1954

To the Honorable Judge Joseph M. Clifford of said Court:

Harry A. Groban and Nathan Groban, petitioners, respectfully represent that they are in prison and restrained of their liberty by the Sheriff of Franklin County pursuant to order of Willis S. Peterson, Deputy Fire Marshal of the State of Ohio, without any legal authority but under the color of a pretended commitment for being guilty of contempt for refusing to testify before said officer in a hearing pertaining to a fire.

Petitioners say that said officer intends to examine them under oath pertaining to:

(a) An alleged criminal offense.

(b) Matters that are irrelevent or incompetent as to said alleged offense.

(c) Matters that effect the private business of the petitioners.

Petitioners say that they are not sure what their legal and constitutional rights are and therefore desire and need legal counsel to advise them at the hearing.

Petitioners say that said officer has stated that he, the officer, knows who committed the alleged offense, that he does [fol. 2] not suspicion the petitioners, but that the officer says he will compel petitioners to answer any and all questions asked.

Petitioners say that said officer is neither a judge or an attorney, nor versed in the competency or relevancy of testimony, nor is he apprised of the petitioners' legal and constitutional rights.

Petitioners say that said officer has served petitioners with a subpoena Duces Tecum to bring all of the books and

records pertaining to the operation of plaintiffs' business, and that said books will either be:

(a) Incompetent and irrelevant, or

(b) Used by said officer for the purpose of trying to incriminate petitioners.

Petitioners say that said officer has stated that the amount of the fire loss to be filed by the petitioners due to the fire will be considered by the officer as to who started the fire which is being investigated at this hearing.

Petitioners say that they are innocent of any criminal offense, that they are business men of good repute, and have offered and are willing to testify under oath fully as to anything they know about said alleged criminal offense if permitted to have legal counsel with them at this hearing. Legal counsel is desired for the sole purpose of advising petitioners as to the competency and relevancy of any question, and the legal and constitutional rights of the petitioners.

[fol. 3] Petitioners say they believe they have legal and constitutional rights to have legal counsel to advise them of their rights at all times and especially at this hearing.

Petitioners have refused to testify for the sole reason that said officer denies petitioners the right of legal counsel at the hearing.

Therefore, said Harry A. Groban and Nathan Groban pray that a Writ of Habeas Corpus issue to said Sheriff, that said Harry A. Groban and Nathan Groban will be brought before this Court and be discharged from said imprisonment and the restraining of their liberty.

(S.) Harry A. Groban, (S.) Nathan Groban.

Duly Verified.

[File endorsement omitted.]

[fol. 4] COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 189,395

DECISION—April 21, 1954

CLIFFORD, J.

Petitioners have invoked the jurisdiction of this Court by a petition in Habeas Corpus to obtain their release from incarceration in the Franklin County, Ohio, jail to which they were ordered committed by the State Fire Marshal by virtue of Section 3737.99 (A) Revised Code of Ohio for violation of Section 3737.12 of the Revised Code; for their refusal to be sworn and refusal to testify in the investigation of the fire at Dresden Mills, Inc. on January 22, 1954, at 12:30 A. M.

The pertinent facts, as alleged in the petition and disclosed by the record of the proceedings before the State Fire Marshal on March 1, 1954, are these: That Nathan Groban and Harry Groban were subpoen-ed by the State Fire Marshal, under Section 3737.11 of the Revised Code, as witnesses in an investigation. They appeared accompanied by their counsel, Mr. Ernest Graham. The Fire Marshal determined that the investigation should be private, under Section 3737.13 Revised Code, excluding Mr. Graham. [fol. 5] Nathan Groban and Harry Groban then refused to be sworn and testify, giving the exclusion of their counsel as the reason therefor. They were specifically apprised of the statutes setting forth the powers of the Fire Marshal, and still refused to be sworn, to testify, or to state whether they had complied with the subpoena duces tecum.

Thereupon, the Fire Marshal, by virtue of Section 3737.99 (A) Revised Code, committed them to the County Jail.

Counsel for petitioners raises the following issue:

Does the State Fire Marshal have the power to compel a witness to testify under oath after refusing the witness's request for his legal counsel to be present?

Counsel for petitioners contends that the State Fire Marshal has either exceeded his bounds in assuming too much power, thereby failing to exercise his functions within the meaning of the statute Section 3737.13, or, that said statute is unconstitutional. On the other hand, counsel for respond-

ents contend that the Sheriff of Franklin County, Ohio, is holding the petitioners, subject to bond set by the Court, pursuant to a valid commitment made by the State Fire Marshal in accordance with the law. Comprehensive briefs have been filed by both counsel to support their respective contentions.

The Court finds that the Opinion of the Attorney General, 1941, O. A. G. 3599, states that the law applicable to the case at bar, as follows:

> [fol. 6] "(1) When an investigation is being conducted by or under the direction of the state fire marshal, to determine the cause, origin and circumstances of a fire (Sec. 824, et seq. G. C.), by the express provision of Section 832, General Code, such investigation may, in the discretion of the fire marshal, be privately conducted. A witness called to testify in such an investigation is not entitled to counsel, nor may counsel appear with and speak for a witness if the fire marshal determines that the investigation shall be private.
>
> (2) The provisions of Section 832, General Code, authorizing and empowering an investigation conduced by, or under the direction of, the state fire marshal, as to the origin, cause and circumstances of a fire, do not contravene Section 10, Article I, or any other section, of the Constitution of Ohio.
>
> (3) Both at common law and under the Constitution of Ohio, including Section 10, Article I, no person can be compelled to be a witness against himself. This privilege is a strictly personal privilege, to be claimed by the interested person.
>
> (4) The question of whether or not testimony given by a witness in the public or private investigation of the cause, origin and circumstances of a fire by, or under the direction of, the state fire marshal, may be introduced in the trial of such witness in case he be subsequently indicted and tried, either as a confession, an admission against interest, or for the purpose of impeachment, is one for the courts of this state, rather than this office, to determine."

By virtue of the law, logically reasoned and established in said attorney general's opinion, this Court adopts such law as its own opinion as to what the law is and ought to be as applicable to the case at bar, and therefore, finds that the Sheriff of Franklin County, Ohio, is holding the petitioners, subject to bond set by the Court, pursuant to a [fol. 7] valid commitment made by the State Fire Marshal in accordance with the statutes, held to be constitutional by this Court.

The petition contains no allegation of fact which entitles petitioners to the relief sought. The relief prayed for is denied.

Bond set aside and petitioners remanded to custody.

(S.) Joseph M. Clifford, Judge.

[File endorsement omitted.]

[fol. 8] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Caption omitted]

No. 189,395

AFFIDAVIT OF PETITIONERS—Filed April 28, 1954

STATE OF OHIO,
Muskingum County, ss.

Harry A. Groban and Nathan Groban, Petitioners, being first duly cautioned and sworn, say that, at the time they were subpoenaed to appear before the State Fire Marshal at Columbus, Ohio, at that time they believed and still believe that the State Fire Marshal believed that Petitioners were guilty of causing said fire to be started and, therefore, were guilty of a criminal offense and would attempt to so charge them.

Further affiants sayeth not.

(S.) Harry A. Groban, (S.) Nathan Groban.

Duly Verified.

[File endorsement omitted.]

[fol. 9] IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 5111

OPINION—October 8, 1954

Messrs. Graham, Graham, Hollingsworth, Gottlieb & Johnston, Mr. Ernest B. Graham, of Counsel, Citizens National Bank Building, Zanesville, Ohio, for Petitioners-Appellants.

Mr. Frank H. Kearns, Prosecuting Attorney, Mr. Earl W. Allison, Assistant Prosecuting Attorney, of Counsel, Courthouse, Columbus 15, Ohio, for Respondent-Appellee.

MILLER, J.

This is a law appeal from the judgment of the Common Pleas Court denying the appellants herein relief from a prison sentence on a writ of habeas corpus.

The record discloses that on January 22, 1954, a fire occurred on the premises of the Dresden Mills, Incorporated, Dresden, Ohio, which is owned, controlled and operated by the appellants. Shortly thereafter, the State Fire Marshal started an investigation as to the cause of the fire and pursuant to the same subpoenaed the appellants together with all the records pertaining to the operation of their business. [fol. 10] They appeared in accordance with the subpoena, accompanied by their counsel. The State Fire Marshal refused to permit the appellants to have counsel present at the investigation and ordered that the appellants take oath and testify after excluding the presence of their counsel. The appellants refused to be sworn and testify for the reason that they were not permitted to be represented by their attorney. Thereupon the State Fire Marshal committed the appellants to the Sheriff of Franklin County, Ohio, to be incarcerated until they were willing to testify.

The error assigned is that the Court erred in its interpretation of Section 3737.13 of the Revised Code of Ohio, and that its judgment is contrary to law. This Section of the Code provides:

> "Investigation by or under the directing of the fire marshal may be private. The marshal may exclude

> from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The trial court held that under this section of the Code the Fire Marshal has a discretionary power to determine whether or not his investigation shall be in private and if so, that counsel for a witness may not be permitted to be present at the hearing. We think the Court properly construed the construction of the Code under consideration. The law seems to be well established that where a statute is plain and unambiguous the terms thereof shall be construed to have their ordinary meaning. It not only provides [fol. 11] that the investigation may be private but it goes further and defines the meaning of the word "private", to wit, "the marshall may exclude * * * all persons other than those required to be present * * *." Clearly, counsel for a witness is not a person whose presence is required before a fire marshal may proceed with the investigation; hence, his presence may be denied if so ordered by the marshal.

The next question presented is whether this statutory construction denies the appellants a right or privilege guaranteed to them by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of Ohio. The appellants' brief states that "It is a fundamental principle that the first ten Amendments to the Federal Constitution are solely restrictions on the Federal Government and provide no limitations as to state governments." It states, however, that their interpretation should be valuable to the issues here by way of analogy. The cases cited, however, deal primarily with the principle of self incrimination which is not the issue in this case. It is not the contention of the appellee that the State Fire Marshal can compel a person called before him in an investigation to answer a question which would incriminate him. Therefore, the cases cited referring to these Amendments cannot be helpful in deciding the matter before this Court.

We shall next give consideration to Article I, Section 10 of the Ohio Constitution which provides in part:

> [fol. 12] "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * * no person shall be compelled, in any criminal case, to be a witness against himself; * * *."

It is to be noted that the Amendment refers only to criminal cases, but the right of a witness in other proceedings to assert the privilege has been upheld in numerous cases. 42 O. Jur. 48. Therefore, whatever privileges are granted in criminal cases are also available to the appellants in this proceeding. It is merely an investigation for the purpose of determining the cause, origin and circumstances of the fire and whether or not a crime has been committed. The privilege is a personal one and does not extend to all questions which might be asked of a witness. The time for the assertion of the privilege is after the witness has been sworn and not before. State v. Cox, 87 O. S. 113. These appellants refused to be sworn and no questions were asked upon which the privilege could have been exercised. In the case of Burke v. State, 104 O. S. 220, the Court held that a witness is presumed to know his constitutional privileges and that it was not necessary that he be instructed on the same before answering incriminating questions. At page 229 of the Burke case, Chief Justice Marshall says:

> "It is claimed that Burke was not advised as to his constitutional rights, or cautioned against testifying to any matters which might tend to incriminate him. This privilege has always been treated as a personal [fol. 13] privilege to be claimed by the interested party, and in the absence of his claiming the privilege, or refusing to testify, he will be deemed to have voluntarily testified. We know of no authority or rule of law which makes it obligatory upon the grand jury or the prosecutor in charge of the grand jury to advise the witness as to his constitutional rights and privileges, or to caution him in any respect. In this matter, as in all other matters, the witness will be presumed

to know the law and therefore will be presumed to have knowledge of his constitutional rights and guaranties, and if he does not claim them without being cautioned the presumption arises that his testimony was voluntarily given."

If it was not obligatory upon those in charge of the grand jury to inform the witness of his privileges it would not seem that the presence of his counsel could be demanded for this same purpose in a somewhat similar proceeding. The same constitutional principles should be applied to investigations by a fire marshal as to those by a grand jury. In the case of the latter it will be noted that the statute prescribes that the prosecutor may be present and interrogate witnesses or advise on legal matters, but counsel for a witness is necessarily excluded. The fire marshal's investigation is one step removed from that of the grand jury. If he finds that a crime has been committed "he shall furnish the prosecuting attorney such evidence with the names of the witnesses, and a copy of the material testimony taken in the case." R. C. 3737.10. The reasons for secrecy before a grand jury are that it is in the furtherance of justice. 24 Am. Jur. 865. And it is for the same reason that R. C. 3737.13 was enacted permitting the fire marshal to conduct private investigations.

[fol. 14] We have examined the opinion of the trial court and are also in accord with the reasons he assigned in denying the writ to the appellants.

We find no error in the record and the judgment will be affirmed.

Wiseman, P. J., and Hornbeck, J., concur.

[File endorsement omitted.]

[fol. 15] In the Court of Appeals of Franklin County, Ohio

Judgment—Filed October 18, 1954

This cause came on to be heard upon notice of appeal, transcript of the original docket and journal entries, as-

signment of error, and briefs and arguments of counsel; and the Court being fully advised in the premises finds that there is no error apparent in the proceedings in the Court of Common Pleas nor in said record, and does hereby affirm the judgment of the Court of Common Pleas of Franklin County, Ohio.

It is therefore ordered, adjudged, and decreed that the judgment aforesaid be affirmed, and that the Writ of Habeas Corpus prayed for should be and the same hereby is denied. It is further ordered that the appeal bond staying the execution of the order of the Court of Common Pleas of Franklin County be and the same hereby is set aside. The appellants are hereby ordered to pay the costs herein.

To all of which the appellants except.

(S). Wm. C. Wiseman, Judge, (S.) Fred J. Miller, Judge.

[File endorsement omitted.]

[fol. 16] THE SUPREME COURT OF OHIO

Case No. 34244

IN RE: PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN ET AL.

Fire Marshal—investigations—may be private—exclusion of persons not required to be present—witnesses—not entitled to be represented by counsel—not compelled to testify against themselves—privilege against self-incrimination asserted, how—Section 3737.13 revised code, not violative of constitutional provisions.

OPINION—July 13, 1955

1. Under the provisions of Section 3737.13, Revised Code, the state Fire Marshal may conduct a private investigation to determine the cause of a fire, and he may exclude from the place where such investigation is held all persons other than those required to be present.

2. If the Fire Marshal determines that such investigation shall be private, a witness called to testify therein is not entitled to be represented therein by counsel.

3. In such investigation a witness can not be compelled to testify against himself.

4. To assert the privilege against self-incrimination, a witness must first be sworn.

5. The provisions of Section 3737.13, Revised Code, are not violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States or of the provisions of Section 10 of Article I of [fol. 17] the Constitution of Ohio relating to self-incrimination and the right to representation by counsel.

(Decided July 13, 1955.)

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

In the Court of Common Pleas the petitioners instituted this action for a writ of habeas corpus in order to secure their release from the county jail to which they were sentenced by the state Fire Marshal for refusal to be sworn or to testify in an investigation which that official conducted concerning a fire on the premises of the Dresden Mills, Inc., Dresden, Ohio, on January 22, 1954.

The relief was denied by the trial court.

On an appeal to the Court of Appeals on questions of law, the judgment of the Court of Common Pleas was affirmed.

The cause is in this court on an appeal as of right on the ground that a debatable constitutional question is involved.

WEYGANDT, Chief Justice.

The investigation by the state Fire Marshal was conducted under favor of Section 3737.08 *et seq.*, Revised Code.

The provisions under question in this action are those contained in Section 3737.13, Revised Code, which read [fol. 18] as follows:

"Investigation by or under the direction of the Fire Marshal may be private. The marshal may exclude from

the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The reason given by the appellant petitioners for their refusal to be sworn or to testify was that the state Fire Marshal refused to permit them to have counsel present to represent them at the hearing.

The first contention of the appellants is that under the provisions of the above-quoted statute the Fire Marshal is not authorized to exclude counsel for a witness. However, the language is broad and provides clearly that "the marshal may exclude * * * all persons other than those required to be present." There is no intimation that counsel for a witness is required to be present.

The remaining contention of the appellants is that, if the statute authorizes the exclusion of counsel, it is violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States and of the provisions of Section 10 of Article I of the Constitution of Ohio, the latter of which read in part as follows:

"In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel [fol. 19] * * *. No person shall be compelled, in any criminal case, to be a witness against himself * * *."

As observed by the lower courts, there are several reasons why these provisions are inapplicable to the instant investigation. There is no "trial" or "criminal case" pending; there is no "accused party"; this matter is not pending in "any court"; self-incrimination is not involved, inasmuch as the Fire Marshal agrees that the appellants can not be compelled to testify against themselves; the privilege is personal; and these appellants have not even been sworn, as this court held necessary in the case of State v. Cox, 87 Ohio St., 313, 101 N. E., 135, before the privilege can be asserted.

Hence, it is apparent that the constitutional rights of the appellants have not been violated and that the lower courts were correct in denying the relief sought.

Judgment affirmed.

MATTHIAS, HART, ZIMMERMAN, STEWART, BELL and TAFT, JJ., concur.

[fol. 20] IN THE SUPREME COURT OF OHIO

JOURNAL ENTRY OF JUDGMENT—July 13, 1955

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Franklin County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

[fol. 21] It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $.....

Ordered, That a special mandate be sent to the Court of Common Pleas of Franklin County, to carry this Judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Franklin County, "for entry."

[fol. 22] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 34244

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 10, 1955

I. Notice is hereby given that Harry A. Groban and Nathan Groban, petitioners-appellants, hereby appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Ohio affirming the judgment rendered by the Court of Appeals of Franklin County, Ohio, entered in this action on July 1, 1955. This appeal is taken pursuant to *28 U.S.C. 1257 (2)*.

II. The clerk will please prepare a transcript of record in this cause for transmission to the Clerk of the Supreme

Court of the United States, and include in said transcript the following:

1. Return in Court of Common Pleas, Franklin County
2. Entry—filing bond—Court of Common Pleas, Franklin County
3. Affidavit of Harry and Nathan Groban
4. Petition for Writ of Habeas Corpus
5. Precipe of preparation of record
6. Decision—Judge Clifford—Court of Common Pleas, Franklin County
7. Transcript of Docket and Journal Entries in the Court of Appeals of Franklin County
8. Entry fixing bond—Court of Appeals, Franklin County
9. Motion to dismiss appeal on law and fact
10. Memorandum of Petitioners-Appellants
11. Entry—Granting leave to perfect appeal
12. Opinion—Judge Miller—Court of Appeals, Franklin County

[fols. 23-24] 13. Entry—Court of Appeals, Franklin County

14. Entry fixing bond—Supreme Court of Ohio
15. Notice of Appeal to Supreme Court of Ohio
16. Precipe for Record
17. Motion to Certify Record
18. Assignment of Error
19. Motion to Dismiss
20. Entry overruling Motion to Dismiss
21. Entry overruling Motion to Certify Record
22. Final Entry Affirming Judgment
23. Opinion of the Supreme Court of Ohio
24. Transcript of Docket and Journal Entries

III. The following questions are presented by this appeal:

1. *Is Revised Code Sec. 3737.13* of the Laws of Ohio repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United

States; having been construed as to permit the Fire Marshal of the State of Ohio to exclude counsel for the petitioners—appellants while the latter are appearing before the Fire Marshal pertaining to the criminal act of arson?

2. Is *Revised Code Sec. 3737.13* of the Laws of Ohio repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States when construed in the light of the powers granted to the Fire Marshal of the State of Ohio by *Revised Code Sections 3737.01 to 3737.99* inclusive?

Ernest B. Graham, Attorney for Harry A. Groban and Nathan Groban, Petitioners-Appellants, Citizens Natl. Bank Bldg., Zanesville, Ohio—Phone GL-2-8484.

PROOF OF SERVICE (omitted in Printing)

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER RE: JURISDICTION—April 23, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Rule 16 (4). The parties are requested to discuss in their briefs and oral arguments this Court's jurisdiction to consider any questions raised by the possible applicability of In re Murchison, 349 U. S. 133, and In re Oliver, 333 U. S. 257 to the proceedings involved in this case.

April 23, 1956.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN.

JURISDICTIONAL STATEMENT.

I. The Supreme Court of Ohio's decision pertaining to this matter is reported in *164 O. S., 26.* A copy of said decision is appended to this statement.

II. This is a proceeding for a writ of habeas corpus. The Supreme Court of Ohio in its decision rendered July 13, 1955, found that *Section 3737.13* of the Revised Code of Ohio permitted the state fire marshal to refuse to permit the petitioners-appellants to have counsel present to repre-

sent them at the hearing, and that said statute was not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The notice of appeal from this decision was filed on October 10, 1955, in the Supreme Court of Ohio.

III. This court has jurisdiction of this case pursuant to *28 U. S. C., 1257 (2).*

IV. The following cases sustain the jurisdiction of this court:

(a) *Wolf v. Colorado,* 338 U. S., 25, 93 L. Ed., 1782;
(b) *U. S. v. Pitt,* 144 F. 2d, 169.

V. The text of *Section 3737.13* of the Revised Code of Ohio is as follows:

> "Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

VI. The state fire marshal conducted the investigation under favor of *Section 3737.08 et seq.* of the Revised Code of Ohio. The fire marshal pursuant to *Section 3737.13* of the Revised Code ordered counsel for the petitioners-appellants from the room and commenced the investigation.

Question: Is *Section 3737.13* of the Revised Code of Ohio in violation of the rights of the petitioners-appellants as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

VII. On January 22, 1954, a fire occurred on the premises of the Dresden Mills, Inc., Dresden, Ohio, which is owned, controlled and operated by the petitioners. Shortly thereafter the state fire marshal started an investigation as to the cause of the fire and pursuant to said investigation

subpoenaed the petitioners, together with all of the records pertaining to the operation of the petitioners' business. The petitioners appeared in accordance with the subpoena, accompanied by their counsel. The state fire marshal refused to permit the petitioners to have counsel present at the investigation and demanded that the petitioners take oath and testify after excluding the presence of their counsel. The petitioners refused to be sworn and to testify for reason that they were not permitted to be represented by counsel. Thereupon the state fire marshal committed the petitioners to the sheriff of Franklin county, Ohio, to be incarcerated until they testified. The petition for a writ of habeas corpus was filed in the Franklin county Common Pleas Court and the constitutional question was immediately raised by the following language appearing in the petition:

> "Petitioners say they believe they have legal and constitutional rights to have legal counsel to advise them of their rights at all times and especially at this hearing."

Judge Clifford of the Court of Common Pleas of Franklin county, Ohio, on pages two (2) and three (3) of his decision stated:

> "Counsel for petitioners contends that the State Fire Marshal has either exceeded his bounds in assuming too much power, thereby failing to exercise his functions within the meaning of the statute Section 3737.13, or, that said statute is unconstitutional."
>
> "* * * therefore, finds that the Sheriff of Franklin County, Ohio, is holding the petitioners, subject to bond set by the Court, pursuant to a valid commitment made by the State Fire Marshal in accordance with the statutes, held to be constitutional by this Court."

The decision of the Common Pleas Court was appealed and again the constitutional question was raised as appears from the language of the Court of Appeals on page three (3) of the opinion written by Judge Miller:

> "The next question presented is whether this statutory construction denies the appellants a right or privilege guaranteed to them by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States * * *"

The constitutional question was again raised and passed upon by the Supreme Court of Ohio. The following language appears on page 28 of the decision of the Supreme Court of Ohio:

> "The remaining contention of the appellants is that, if the statute authorizes the exclusion of counsel, it is violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States * * *"
>
> "Hence, it is apparent that the constitutional rights of the appellants have not been violated and that the lower courts were correct in denying the relief sought."

VIII. The fire marshal by the legislature is clothed with the sole unrestrained and unlimited power to call before him any person supposed to be cognizant of any facts or to have means of knowledge in relation to the matter concerning which an examination is required to be made, and may require the production of any book, paper, or document, then and there at his pleasure.

If the fire marshal or one of his assistants is of the opinion that there is evidence sufficient to charge a person with arson or a similar crime, he shall arrest such person or cause him to be arrested and charged with such offense.

There are no provisions limiting or restraining the fire marshal in regard to the time or manner the hearing is to

be conducted. He is solely vested with the power to determine what questions are to be asked, how they shall be asked, and what book, paper or document shall be produced. Apparently such powers are not enough. The fire marshal of the state of Ohio is invested with the authority, which no court claims, of denying a witness counsel, even in the face of a request for the same. So clad with all this power, who is to say he will use it discreetly and properly, or improperly, and arbitrarily?

The legislature does not have the power to grant the fire marshal that which he herein is attempting to exercise. The individual has certain rights as a citizen, and no legislative body can invest a fellow citizen, layman or professional, with such arbitrary power. No judicial tribunal in this country has attempted to arbitrarily deprive a citizen of counsel when the same was requested. Such power is in violation with an individual's rights as afforded by the Fourteenth Amendment of the federal Constitution.

Although the Fourteenth Amendment to the U. S. Constitution is not shorthand for the first eight amendments of said Constitution, this latter amendment places definite restrictions upon any state action as is shown by the language of the United States Supreme Court in the case of *Wolf v. Colorado,* 338 U. S., 25, 93 L. Ed., 1782, such language being as follows:

> "This clause exacts from the states for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty', * * *.
>
> Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities.

> It is *the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle,* due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (Emphasis supplied)

The language of the Fourteenth Amendment to the United States Constitution clearly gives the individual certain rights as a citizen of the United States. In keeping with these rights, this writer feels that the decision rendered in the case of *United States v. Pitt,* 144 F. 2d, 169, is indeed enlightening. In that case the defendant was contesting the validity of certain sections of the Selective Service Act. Judge Biggs in delivering the opinion for the Third Circuit stated:

> "Section 625.1 (b) of the Regulations provides, however, that no person other than the registrant may appear in person before a local board. This is in effect a denial of the right to be represented by counsel before the Selective Service agencies. *While a denial of the right to counsel in a judicial proceeding would constitute a denial of due process,* the proceedings before the selective service agencies are not within that category. It will be observed moreover—*he at no time requested the Board to permit counsel to appear on his behalf. He does not assert that his lack of counsel is evidence of denial of due process.*" (Emphasis supplied)

Although the defendant did not request counsel in the *United States v. Pitt* case, supra, nor did he claim the lack of counsel was evidence of a denial of due process, Circuit Judge Biggs thought the matter to be of such a nature as to state:

> "The proceedings before the local boards and the appeal boards are informal, stripped of any panoply of formal judicial tribunals. The local boards are com-

posed of persons who are or should be familiar with conditions in the county in which they serve. Frequently they know the registrant and certainly they may not be deemed to be unaware of the problems which confront him. The registrant has the opportunity, if he seeks it, to sit down with the members of his local board and discuss fully with them his status or his claim for exemption. *We doubt if a better, fairer method could be devised to meet the requirement of raising armed forces in an emergency.* We are of the opinion, therefore, that the provisions of the Act afford adequate protection for the rights of the individual registrant, that they afford him due process of law, and that the Act is constitutional in all respects." (Emphasis supplied)

The proceeding referred to in the above quote was but for the purpose of classifying prospective service men. Judge Biggs did not attempt to decide the question on the basis of denial of due process since that question was not raised in the case before him.

Clearly the tenor of the inquiry before the local draft board is indeed in a different category than the investigation of a fire marshal and in particular the investigation apparently being sought to be conducted by the fire marshal in relation to the petitioners.

Since *Section 3737.13* has been interpreted so as to enable the marshal to exclude counsel for a witness, irrespective of the witness's request, the statute permits a deprivation of the rights protected by the Fourteenth Amendment to the Constitution of the United States and is therefore an unconstitutional legislative act.

The administrative branch of both the federal and state governments has developed to such an extent that investigations are being almost continually conducted. The rights of a citizen of the United States appearing before such

investigatory bodies should be determined and, in particular, the question of a witness appearing before such bodies right to counsel is so substantial as to require plenary consideration with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

GRAHAM, GRAHAM, GOTTLIEB & JOHNSTON,
ERNEST B. GRAHAM and
JAMES F. GRAHAM,
Of Counsel,
Citizens National Bank Bldg., Zanesville, Ohio,
Attorneys for Petitioners-Appellants.

APPENDIX A.

Opinion—Common Pleas Court.

(Rendered this 21st day of April, 1954.)

Clifford, J.:

Petitioners have invoked the jurisdiction of this court by a petition in habeas corpus to obtain their release from incarceration in the Franklin county, Ohio, jail to which they were ordered committed by the state fire marshal by virtue of Section 3737.99 (A), Revised Code of Ohio for violation of Section 3737.12 of the Revised Code; for their refusal to be sworn and refusal to testify in the investigation of the fire at Dresden Mills, Inc. on January 22, 1954, at 12:30 a. m.

The pertinent facts, as alleged in the petition and disclosed by the record of the proceedings before the state fire marshal on March 1, 1954, are these: That Nathan Groban and Harry Groban were subpoenaed by the state fire marshal, under Section 3737.11 of the Revised Code, as witnesses in an investigation. They appeared accompanied by their counsel, Mr. Ernest Graham. The fire marshal determined that the investigation should be private, under Section 3737.13, Revised Code, excluding Mr. Graham. Nathan Groban and Harry Groban then refused to be sworn and testify, giving the exclusion of their counsel as the reason therefor. They were specifically apprised of the statutes setting forth the powers of the fire marshal, and still refused to be sworn, to testify, or to state whether they had complied with the subpoena duces tecum.

Thereupon, the fire marshal, by virtue of Section 3737.99 (A), Revised Code, committed them to the county jail.

Counsel for petitioners raises the following issue:

Does the state fire marshal have the power to compel a witness to testify under oath after refusing the witness's request for his legal counsel to be present?

Counsel for petitioners contends that the state fire marshal has either exceeded his bounds in assuming too much power, thereby failing to exercise his functions within the meaning of the statute Section 3737.13, or, that said statute is unconstitutional. On the other hand, counsel for respondents contend that the sheriff of Franklin county, Ohio, is holding the petitioners, subject to bond set by the court, pursuant to a valid commitment made by the state fire marshal in accordance with the law. Comprehensive briefs have been filed by both counsel to support their respective contentions.

The court finds that the opinion of the attorney general, 1941, O. A. G. 3599, states the law applicable to the case at bar, as follows:

Syllabi.

"(1) When an investigation is being conducted by or under the direction of the state fire marshal, to determine the cause, origin and circumstances of a fire (Sec. 824, et seq. G. C.), by the express provision of Section 832, General Code, such investigation may, in the discretion of the fire marshal, be privately conducted. A witness called to testify in such an investigation is not entitled to counsel, nor may counsel appear with and speak for a witness if the fire marshal determines that the investigation shall be private.

(2) The provisions of Section 832, General Code, authorizing and empowering an investigation conducted by, or under the direction of, the state fire marshal, as to the origin, cause and circumstances of a fire, do not contravene Section 10, Article I, or any other section, of the Constitution of Ohio.

(3) Both at common law and under the Constitution of Ohio, including Section 10, Article I, no person can be compelled to be a witness against himself. This

privilege is a strictly personal privilege, to be claimed by the interested person.

(4) The question of whether or not testimony given by a witness in the public or private investigation of the cause, origin and circumstances of a fire by, or under the direction of, the state fire marshal, may be introduced in the trial of such witness in case he be subsequently indicted and tried, either as a confession, an admission against interest, or for the purpose of impeachment, is one for the courts of this state, rather than this office, to determine."

By virtue of the law, logically reasoned and established in said attorney general's opinion, this court adopts such law as its own opinion as to what the law is and ought to be as applicable to the case at bar, and therefore, finds that the sheriff of Franklin county, Ohio, is holding the petitioners, subject to bond set by the court, pursuant to a valid commitment made by the state fire marshal in accordance with the statutes, held to be constitutional by this court.

The petition contains no allegation of fact which entitles petitioners to the relief sought. The relief prayed for is denied.

Bond set aside and petitioners remanded to custody.

APPENDIX B.

Opinion—Court of Appeals.

(Rendered on the 8th day of October, 1954.)

Miller, J.:

This is a law appeal from the judgment of the Common Pleas Court denying the appellants herein relief from a prison sentence on a writ of habeas corpus.

The record discloses that on January 22, 1954, a fire occurred on the premises of the Dresden Mills, Incorporated,

Dresden, Ohio, which is owned, controlled and operated by the appellants. Shortly thereafter, the state fire marshal started an investigation as to the cause of the fire and pursuant to the same subpoenaed the appellants together with all the records pertaining to the operation of their business. They appeared in accordance with the subpoena, accompanied by their counsel. The state fire marshal refused to permit the appellants to have counsel present at the investigation and ordered that the appellants take oath and testify after excluding the presence of their counsel. The appellants refused to be sworn and testify for the reason that they were not permitted to be represented by their attorney. Thereupon the state fire marshal committed the appellants to the sheriff of Franklin county, Ohio to be incarcerated until they were willing to testify.

The error assigned is that the court erred in its interpretation of Section 3737.13 of the Revised Code of Ohio, and that its judgment is contrary to law. This section of the Code provides:

> "Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The trial court held that under this section of the Code the fire marshal has a discretionary power to determine whether or not his investigation shall be in private and if so, that counsel for a witness may not be permitted to be present at the hearing. We think the court properly construed the construction of the Code under consideration. The law seems to be well established that where a statute is plain and unambiguous the terms thereof shall be con-

strued to have their ordinary meaning. It not only provides that the investigation may be private but it goes further and defines the meaning of the word "private", to wit, "the marshal may exclude * * * all persons other than those required to be present * * *." Clearly, counsel for a witness is not a person whose presence is required before a fire marshal may proceed with the investigation; hence, his presence may be denied if so ordered by the marshal.

The next question presented is whether this statutory construction denies the appellants a right or privilege guaranteed to them by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of Ohio. The appellants' brief states that "It is a fundamental principle that the first ten amendments to the federal Constitution are solely restrictions on the federal government and provide no limitations as to state governments." It states, however, that their interpretation should be valuable to the issues here by way of analogy. The cases cited, however, deal primarily with the principle of self incrimination which is not the issue in this case. It is not the contention of the appellee that the state fire marshal can compel a person called before him in an investigation to answer a question which would incriminate him. Therefore, the cases cited referring to these amendments cannot be helpful in deciding the matter before this court.

We shall next give consideration to Article I, Section 10 of the Ohio Constitution which provides in part:

> "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * * no person shall be compelled, in any criminal case, to be a witness against himself; * * *."

It is to be noted that the amendment refers only to criminal cases, but the right of a witness in other proceedings to assert the privilege has been upheld in numerous cases. 42 O. Jur., 48. Therefore, whatever privileges are granted in criminal cases are also available to the appellants in this proceeding. It is merely an investigation for the purpose of determining the cause, origin and circumstances of the fire and whether or not a crime has been committed. The privilege is a personal one and does not extend to all questions which might be asked of a witness. The time for the assertion of the privilege is after the witness has been sworn and not before. State v. Cox, 87 O. S., 113. These appellants refused to be sworn and no questions were asked upon which the privilege could have been exercised. In the case of Burke v. State, 104 O. S., 220, the court held that a witness is presumed to know his constitutional privileges and that it was not necessary that he be instructed on the same before answering incriminating questions. At page 229 of the Burke case, Chief Justice Marshall says:

> "It is claimed that Burke was not advised as to his constitutional rights, or cautioned against testifying to any matters which might tend to incriminate him. This privilege has always been treated as a personal privilege to be claimed by the interested party, and in the absence of his claiming the privilege, or refusing to testify, he will be deemed to have voluntarily testified. We know of no authority or rule of law which makes it obligatory upon the grand jury or the prosecutor in charge of the grand jury to advise the witness as to his constitutional rights and privileges, or to caution him in any respect. In this matter, as in all other matters, the witness will be presumed to know the law and therefore will be presumed to have knowledge of his constitutional rights and guaranties, and if he does not claim them without being cautioned the presumption arises that his testimony was voluntarily given."

If it was not obligatory upon those in charge of the grand jury to inform the witness of his privileges it would not seem that the presence of his counsel could be demanded for this same purpose in a somewhat similar proceeding. The same constitutional principles should be applied to investigations by a fire marshal as to those by a grand jury. In the case of the latter it will be noted that the statute prescribes that the prosecutor may be present and interrogate witnesses or advise on legal matters, but counsel for a witness is necessarily excluded. The fire marshal's investigation is one step removed from that of the grand jury. If he finds that a crime has been committed "he shall furnish the prosecuting attorney such evidence with the names of the witnesses, and a copy of the material testimony taken in the case." R. C. 3737.10. The reasons for secrecy before a grand jury are that it is in the furtherance of justice. 24 Am. Jur., 865. And it is for the same reason that R. C. 3737.13 was enacted permitting the fire marshal to conduct private investigations.

We have examined the opinion of the trial court and are also in accord with the reasons he assigned in denying the writ to the appellants.

We find no error in the record and the judgment will be affirmed.

Wiseman, P. J., and Hornbeck, J., concur.

APPENDIX C.

Opinion—Supreme Court of Ohio.

(Rendered on the 13th day of July, 1955.)

Weygandt, C. J.:

In Re Groban Et Al.

Fire marshal—Investigations—May be private—Exclusion of persons not required to be present—Witnesses—Not entitled to be represented by counsel—Not compelled to testify against themselves—Privilege against self-incrimination asserted, how—Section 3737.13, Revised Code, not violative of constitutional provisions.

1. Under the provisions of Section 3737.13, Revised Code, the state fire marshal may conduct a private investigation to determine the cause of a fire, and he may exclude from the place where such investigation is held all persons other than those required to be present.
2. If the fire marshal determines that such investigation shall be private, a witness called to testify therein is not entitled to be represented therein by counsel.
3. In such investigation a witness can not be compelled to testify against himself.
4. To assert the privilege against self-incrimination, a witness must first be sworn.
5. The provisions of Section 3737.13, Revised Code, are not violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States or of the provisions of Section 10 of Article I of the Constitution of Ohio relating to self-incrimination and the right to representation by counsel.

(No. 34244—Decided July 13, 1955.)

Appeal from the Court of Appeals for Franklin County.

In the Court of Common Pleas the petitioners instituted this action for a writ of habeas corpus in order to secure

their release from the county jail to which they were sentenced by the state fire marshal for refusal to be sworn or to testify in an investigation which that official conducted concerning a fire on the premises of the Dresden Mills, Inc., Dresden, Ohio, on January 22, 1954.

The relief was denied by the trial court.

On an appeal to the Court of Appeals on questions of law, the judgment of the Court of Common Pleas was affirmed.

The cause is in this court on an appeal as of right on the ground that a debatable constitutional question is involved.

Messrs. Graham, Graham, Hollingsworth, Gottlieb & Johnston, for appellants.

Mr. Frank H. Kearns, prosecuting attorney, and Mr. Earl W. Allison, for appellee.

Weygandt, C. J. The investigation by the state fire marshal was conducted under favor of Section 3737.08 et seq., Revised Code.

The provisions under question in this action are those contained in Section 3737.13, Revised Code, which read as follows:

> "Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The reason given by the appellant petitioners for their refusal to be sworn or to testify was that the state fire marshal refused to permit them to have counsel present to represent them at the hearing.

The first contention of the appellants is that under the provisions of the above quoted statute the fire marshal is not authorized to exclude counsel for a witness. However,

the language is broad and provides clearly that "the marshal may exclude * * * all persons other than those required to be present." There is no intimation that counsel for a witness is required to be present.

The remaining contention of the appellants is that, if the statute authorizes the exclusion of counsel, it is violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States and of the provisions of Section 10 of Article I of the Constitution of Ohio, the latter of which read in part as follows:

> "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel * * *. No person shall be compelled, in any criminal case, to be a witness against himself * * *."

As observed by the lower courts, there are several reasons why these provisions are inapplicable to the instant investigation. There is no "trial" or "criminal case" pending; there is no "accused party"; this matter is not pending in "any court"; self-incrimination is not involved, inasmuch as the fire marshal agrees that the appellants can not be compelled to testify against themselves; the privilege is personal; and these appellants have not even been sworn, as this court held necessary in the case of State v. Cox, 87 Ohio St., 313, 101 N. E., 135, before the privilege can be asserted.

Hence, it is apparent that the constitutional rights of the appellants have not been violated and that the lower courts were correct in denying the relief sought.

Judgment affirmed.

Judgment affirmed.

Matthias, Hart, Zimmerman, Stewart, Bell and Taft, JJ., concur.

APPENDIX D.

Entry—Supreme Court of Ohio.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Court of Common Pleas of Franklin county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals, of Franklin county, "for entry."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. ~~545~~ 14

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

APPELLEE'S JURISDICTIONAL STATEMENT

SAMUEL L. DEVINE,
Prosecuting Attorney,
Franklin County, Ohio;
J. RALSTON WERUM,
First Assistant Prosecuting Attorney;
EARL W. ALLISON,
Assistant Prosecuting Attorney;
MALCOLM M. PRINE,
Assistant Prosecuting Attorney,
Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 545

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN

APPELLEE'S JURISDICTIONAL STATEMENT

The question at issue in this cause is set forth in Section VI of the Petitioners-Appellants' jurisdictional statement (at page 2). That question is whether or not Section 3737.13 of the Revised Code of Ohio, which gives to the Fire Marshal of the State of Ohio, while conducting an investigation into the origin of a fire, the right to compel the attendance of witnesses at such investigation and exclude the counsel of the witnesses from the place where such an investigation is held, contravenes the Fourteenth Amendment to the Constitution of the United States or abrogates any right guaranteed to the Petitioners-Appellants by such amendment. The Petitioners-Appellants erroneously answer this question in the affirmative by treating an investigation as though it were a hearing of a quasi-judicial nature, when in fact such an investigation conducted by the State Fire Marshal under this statute is only to determine facts relating to the origin of a fire so

that such facts may be made available to the proper administrative agency and such action as is deemed necessary may be instituted.

I. The Petitioners-Appellants fail to recognize the distinction between an investigation and a hearing. This distinction is recognized in numerous cases including the case of *Bowles* v. *Baer*, reported in 142 Federal (2d) 787, decided by the United States Circuit Court of Appeals of the 7th Circuit on May 25, 1944. The facts of that case arose from an investigation similar in nature to that under consideration in the instant case in that the price administrator, under the provisions of the Emergency Price Control Act of 1942, ordered the defendants to appear without attorneys and without a court reporter for a private investigation by the price administrator. The court in its opinion clearly pointed out the distinction between hearings and investigations. The court stated that investigations are, in effect, informal proceedings held to obtain information to govern further action and they are not proceedings in which action is taken against anyone. On the other hand, hearing contemplates parties, a determination of the law and facts at issue, and a conclusion whereby the right of such parties may be affected. In the latter case, that is, of hearings, parties are entitled to have their attorneys present.

In effect, an investigation by an administrative body is akin to the investigations conducted by Grand Juries. See *Genecov, et al.* v. *Federal Petroleum Board*, 146 Federal (2d) 596. Certiorari denied 65 S. Ct. 913. Grand Jury investigations have for years been conducted in secret and the testimony there elicited becomes the basis, perhaps, for further action. This is not violative of the Fourteenth Amendment of the Constitution of the United States. See *United States* v. *General Supply Association, et al.*, 34 Federal Supplement 241. The court in that case referred to

that part of the Fifth Amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury. The court then stated:

> "That is the only constitutional guaranty regarding the Grand Jury. After the presentment or indictment other guarantees come into play. The accused has then a right to an open trial, to confront the witnesses, to have the assistance of counsel, and trial by jury. These provisions, however, do not affect the deliberations of the Grand Jury."

II. The second point to which the Respondent-Appellee wishes to direct the court's attention is that the Petitioners-Appellants, during the fire marshal's investigation, refused even to be sworn. There is nowhere in the law interpreting the Fourteenth Amendment of the United States Constitution any provision or holding which would protect a person refusing to take an oath because his counsel is not present. In fact, the United States Circuit Court of Appeals for the 9th Circuit in *Goodman* v. *United States,* reported in 108 Federal (2d) 516, specifically held that even compelling a witness to take an oath of secrecy prior to his testifying before the Grand Jury does not violate either the Fifth or Sixth Amendment of the United States Constitution nor does it deprive him of life or liberty without due process of law.

III. It is therefore respectfully submitted that inasmuch as the Petitioners-Appellants in this case refused to take an oath because their counsel could not be with them, the question of whether or not the cloak of protection of the Fourteenth Amendment was upon them is prematurely raised. Secondly, even if the Petitioners-Appellants had

been sworn but refused to answer questions because their counsel was not present, this, as an investigation by an administrative body, does not deprive anyone of any right protected by the Fourteenth Amendment. This investigation is similar in nature to a Grand Jury investigation and it is only if charges should subsequently be brought against these individuals that they could be said at such subsequent time to be placed in jeopardy.

Respectfully submitted,

SAMUEL L. DEVINE,
Prosecuting Attorney;
J. RALSTON WERUM,
First Assistant Prosecuting Attorney;
EARL W. ALLISON,
Assistant Prosecuting Attorney;
MALCOLM M. PRINE,
Assistant Prosecuting Attorney,
Attorneys for Appellee.

(7810-5)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 14.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN.

APPELLANTS' BRIEF.

OFFICIAL REPORTS.

The Court of Common Pleas for Franklin county rendered its decision in this matter on April 21, 1954. The opinion is unreported but appears on page 3 of the record. The Court of Appeals of Franklin county rendered its opinion on October 8, 1954, and, although unreported, said opinion appears at page 6 of the record. The Supreme Court rendered its opinion on July 13, 1955, reported in 164 O. S. 26, 128 N. E. 2d 80, 57 O. O. 84, and appearing at page 10 of the record.

JURISDICTION.

The jurisdiction of this court is invoked by reason that the validity of a statute of the state of Ohio has been questioned on the grounds that it is repugnant to the Constitution of the United States, and the decision of the Supreme Court of Ohio favors the validity of the statute. Jurisdiction is pursuant to 28 U. S. C. 1257 (2) and within the time prescribed by 28 U. S. C. 2101 (c).

In the order of this court of April 23, 1956, it was requested that counsel brief the question of the jurisdiction of this court to consider any questions raised by the possible applicability of *In Re Murchison,* 349 U. S. 133, 99 L. ed 942, and *In Re Oliver,* 333 U. S. 257, 92 L. ed 682 to the proceedings in this case.

In the early case of *Buel v. Van Ness* (1823) 8 Wheat. 312, 5 L. ed. 624, it was determined that it was in the province of Congress to set forth to what extent that jurisdiction shall be vested in the Supreme Court. Congress has determined that jurisdiction, as set forth in 28 U. S. C. 1257, which in part is as follows:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The purpose of this section has been often and clearly stated. That is, to make certain that no judgment of a state court would be reviewed or appealed unless the highest court of the state had first been apprised that the

validity of the statute was being questioned as invalid on federal grounds. *Wilson v. Cook*, 327 U. S. 474, 90 L. ed. 793. The requirements imposed by Section 1257 are construed in the strict and technical sense. *Montgomery v. Ledbetter*, 344 U. S. 180, 79 L. ed. 204. *Radio Station v. Johnson*, 326 U. S. 120, 89 L. ed. 2092.

The only statute drawn in question as being invalid on the ground of its being repugnant to the Constitution was Ohio Revised Code Section 3737.13. (R. 11, 12) However, it is this writer's contention that in determining the repugnancy of this statute to the Constitution and thereby determining its validity, the statutes under favor of which the fire marshal conducted his investigation and the powers granted became pertinent.

The fire marshal conducted his investigation under favor of Section 3737.08, et seq., Ohio Revised Code. (Appendix A)

In the case of *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 the court had before it the Michigan statutes providing for the compelling of witnesses to appear and to testify before a one man grand jury. (Section 28.943 and 28.945) (Appendix B)

The sections similar to the Michigan statutes are:

Ohio Revised Code Section 3737.12:

> "The fire marshal or an assistant fire marshal may administer an oath to any person appearing as a witness before him. No witness shall refuse to be sworn or refuse to testify, or disobey an order of the marshal, or of an assistant marshal, or fail or refuse to produce a book, paper, or document concerning a matter under examination, or be guilty of contemptuous conduct after being summoned by such officer to appear before him to give testimony in relation to a matter or subject under investigation."

Ohio Revised Code Section 3737.99:

> "(A) Whoever violates section 3737.12 of the Revised Code may be summarily punished, by the officer concerned, by a fine of not more than one hundred dollars or commitment to the county jail until such person is willing to comply with the order of such officer."

Mr. Justice Black stated in the majority opinion of the case of *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 as follows:

> "The judge—grand jury immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross examine the other grand jury witness or to summon witnesses to refute the charge against him."
>
> "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (92 L. ed. 694)

In the instant case the fire marshal committed the appellants for refusing to be sworn and to testify. (R. 6) Had the appellants been sworn, found to be in contempt and summarily committed to prison by the fire marshal, and then had the appellants questioned the right to so commit, the doctrine of the cases of *In Re Murchison*, 349 U. S. 133, 99 L. ed. 942, and *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 would be directly in point and controlling.

Even though the facts of this case are not identical and the question as to fire marshal's right to summarily commit has not been raised, these cases and the doctrine set forth in the opinions are definitely significant in this case. It is not the contention of the petitioners that in all instances they are entitled to be represented by counsel. However, when the proceedings are of the nature where the officer, or tribunal before whom they are appearing, has the powers here conveyed to the fire marshal, then the additional power to declare the "hearing" to be private and to deny their request for counsel is a denial of procedural due process.

It is respectfully submitted to be within this court's jurisdiction to consider the applicability of these cases to the statutory power of the fire marshal, thereby disclosing the effect of a private "hearing" and of the denial by the fire marshal of the appellants' request for counsel. Revised Code 3737.13 does not stand alone, but is to be considered in conjunction with Sections 3737.12 and 3737.99, and the power given the fire marshal by such statutes. *In Re Murchison*, 349 U. S. 133, 99 L. ed. 942 and *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 disclose that the fire marshal's use of such powers would constitute a violation of due process. It is urged in this case that in view of such powers, the permitting of a "private hearing" is unconstitutional when "private" means the exclusion of counsel.

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS APPLICABLE.

1. Amendment XIV of the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. Section 3737.13 of the Ohio Revised Code:

"Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

3. Ohio Revised Code sections pertaining to the investigation and powers of the fire marshal:

3737.08, 3737.09, 3737.10, 3737.11, 3737.12 and 3737.99 (Set out verbatim in Appendix A).

QUESTION.

Does the fire marshal's power to declare the hearing before him "private" and to deny appellants' request for counsel deny the appellants due process of law as guaranteed by the XIV Amendment to the United States Constitution?

STATEMENT OF THE CASE.

This matter comes before this Honorable Court as a result of a petition for a writ of habeas corpus being filed in the Common Pleas Court of Franklin county, Ohio, and the decisions of the courts of Ohio denying the writ. (R. 1, 3, 6, 13)

Harry A. Groban and Nathan Groban are the petitioners in the writ and are the appellants in this matter, and will be referred to in this brief as the appellants.

On January 22, 1954, a fire occurred on the premises of the Dresden Mills, Inc., Dresden, Ohio, which is owned, controlled and operated by the appellants. Shortly thereafter, the fire marshal for the state of Ohio started an investigation as to the cause of the fire and pursuant to this investigation subpoenaed the appellants together with all the records pertaining to the operation of their business. The appellants appeared in accordance with the subpoena, accompanied by their counsel. The state fire marshal refused to permit the appellants to have counsel present at the investigation and ordered that the appellants take oath and testify after excluding the presence of their counsel. The appellants refused to be sworn and testify for the reason that they were not permitted to be represented at the hearing by their attorney. Thereupon, the state fire marshal committed the appellants to the sheriff of Franklin county, Ohio, to be incarcerated until they were willing to testify. (R. 6)

ARGUMENT.

(A) Right of Assistance of Counsel.

Counsel on behalf of petitioners have been unable to find either a state or federal case directly in point with the issue in question.

The only provision of the Constitution directly providing for the right to the assistance of counsel is the Sixth Amendment. Not only does the Sixth Amendment apply solely to the federal government, but also the investigation of the fire marshal admittedly is not a "criminal prosecution" and the appellants are not "accused" within the language of said amendment. Clearly, the right to counsel is by no means absolute, but if such right exists, excluding the Sixth Amendment, such right must necessarily be derived from the "due process" clause of the XIV Amendment.

The term "due process of law" is a concept of justice which, being flexible, defies defining appropriately for all circumstances. "Due process" has been defined as merely an embodiment of the English sporting idea of fair play. *People v. Telkin,* 90 P. 2d 148, 34 Cal. App. 2d 743. It has been referred to as any legal proceeding enforced by public authority in furtherance of general public welfare preserving both liberty and the principle of justice. *Mac Veagh v. Multnomah County,* 270 P. 502, 126 Or. 417.

The clause means that the general rules which govern society or the law of the land protect the life, liberty and property of a citizen of the United States. *Cleveland R. R. Co. v. Backus,* 33 N. E. 421, 133 Ind. 513. The term is synonymous with "law of the land" protecting the citizen of the United States to equal and impartial justice in one state as well as another. *U. S. v. Yount,* 267 F. 861.

This Honorable Court in the case of *Wolf v. Colorado,* 338 U. S. 55, 93 L. ed. 1782, set forth the purpose and the construction to be given the clause which affords due process of law.

> "This clause exacts from the states for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty', * * *.
>
> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is *the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle,* due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (Emphasis supplied)

The federal Constitution was not intended to be a rigid document subject only to the strictest of interpretation. The concept of justice might remain the same but change in times might dictate an additional step to protect and insure the concept.

This Honorable Court's attention is respectfully referred to the *U. S. v. Pitt* case, 144 Fed. 2d 169, wherein the defendant was contesting the validity of certain sections of the Selective Service Act. Judge Biggs in delivering the opinion for the Third Circuit stated:

> "Section 625.1 (b) of the Regulations provides, however, that no person other than the registrant may appear before a local board. This is in effect a denial of the right to be represented by counsel before the Selective Service agencies. While a denial of the right to counsel in a judicial proceeding would constitute a denial of due process, the proceedings before

> the selective service agencies are not within that category. It will be observed moreover * * * *he at no time requested the Board to permit counsel to appear on his behalf. He does not assert that his lack of counsel is evidence of denial of due process.*" (Emphasis supplied)

Although the defendant did not request counsel in the case of *United States v. Pitt,* 144 Fed. 2d 169, nor did he claim the lack of counsel was evidence of a denial of due process, Circuit Judge Biggs thought the matter to be of such a nature as to state:

> "The proceedings before the local boards and the appeal boards are informal, stripped of any panoply of formal judicial tribunals. The local boards are composed of persons who are or should be familiar with conditions in the county in which they serve. Frequently they know the registrant and certainly they may not be deemed to be unaware of the problems which confront him. The registrant has the opportunity, if he seeks it, to sit down with the members of his local board and discuss fully with them his status or his claim for exemption. *We doubt if a better, fairer method could be devised to meet the requirement of raising armed forces in an emergency.* We are of the opinion, therefore, that the provisions of the Act afford adequate protection for the rights of the individual registrant, that they afford him due process of law, and that the Act is constitutional in all respects." (Emphasis supplied)

The proceeding referred to in the above quote was but for the purpose of classifying prospective service men. Judge Biggs did not attempt to decide the question on the basis of denial of due process since the proceedings were before the selective service agencies and not within that category.

However, if Judge Biggs thought the question was worth mentioning in a case where it wasn't raised and where he

doubted "if a better or fairer method could be devised", how would his opinion read with the issues of this case placed squarely before him?

Clearly the tenor of the inquiry before the local draft board is indeed in a different category than the investigation of a fire marshal and in particular the investigation sought to be conducted in the instant case.

Counsel upon research of this question found but two classes of cases where, in a preliminary proceeding, a party was denied the assistance of counsel. One was in a court martial proceeding, and the other in a proceeding before a grand jury.

The first "class" consisted of but one case; that is, *Romero v. Squier,* 133 F. 2d 528. In that case the Ninth Circuit Court of Appeals had before it the question of denial of counsel at a preliminary hearing prior to the appellant, Captain R. C. Romero, being court martialed. The pertinent facts appear in the following language at page 532 of the opinion:

> "* * * Appellant also claims that he was denied counsel at the investigation into the matters upon which the charge against him was later made, and hence that he was denied the right of counsel of the provision in the Sixth Amendment. The pertinent portion of that Amendment reads, 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Asistance of Counsel for his defense'. We do not regard the preliminary investigation as the 'criminal prosecution' for which the Sixth Amendment provides. Hence a failure to give the right of counsel to the party whose conduct is under preliminary investigation, is not a denial of a constitutional right so affecting the jurisdiction of the later convened court-martial, and hence is not subject to our consideration in a habeas corpus proceeding. * * *"

Writ of certiorari was denied by this court (318 U. S. 785, 87 L. ed. 1152). The court merely decided that the juris-

diction of a later convened court martial was not lost when at a preliminary investigation the defendant was denied counsel.

Pertaining to the preliminary investigation, the court failed to disclose:

(a) The nature, tenor, and significance or consequence of the investigation.

(b) Whether one or more persons conducted the investigation and whether the defendant was present by choice or compulsion.

Without the above facts there is absolutely no basis upon which to compare the proceedings in the above cited case to the matter before this Honorable Court and with these facts answered there would still be the question as to what procedural safeguards one is entitled in a civil court that he is not entitled before a military tribunal.

Even if the investigation was similar to the fire marshal's, this case would be of no value or significance in light of the case of *Reaves v. Ainsworth,* 219 U. S. 296, 55 L. ed. 225. In that case this court clearly and emphatically distinguished proceedings before the armed services from proceedings of this nature. The following language appears on pages 302-305 of the opinion of that case:

> "To those in the military or naval service of the United States, the military law is due process."

In the case of *Ex parte Benton,* 63 F. Supp. 808, the petitioner claimed a violation of the Sixth Amendment on the basis of ineffective assistance of counsel. The court stated at page 810 of its opinion:

> "But petitioner claims that the military court which tried and sentenced him lacked jurisdiction because he did not have the effective assistance of counsel for his defense as guaranteed by the Constitution (Amdt. VI) * * *"

> "This contention of petitioner is legally unsound because the constitutional guarantees of the 5th and 6th amendments relating to criminal prosecutions may not be invoked in 'cases arising in the land or naval forces' of the United States." (citing: Ex parte Quirin, 317 U. S. 1; Ex parte Milligan, 71 U. S. 2; U. S. v. Crystal, 131 F. 2d 576)

The case of *In Re Black,* 47 F. 2d 542, decided by the Second Circuit stands as having denied a witness the right to counsel. Judge Augustus Hand in the opinion whereby a motion to vacate was denied and the petitioner was ordered to appear before a New York grand jury, stated at page 543:

> "Neither at a trial nor before a grand jury is he entitled to have the aid of counsel when testifying."

Later *In Re Black,* 47 F. 2d 542 was cited and followed by the District Court of Missouri in the case of *U. S. v. Blanton,* 77 F. Supp. 812. This case was one where defendant complained that he "was not advised of his right of counsel" when he was called before the grand jury.

In these cases the investigation was before a grand jury. There was no indication that the hearing was in any nature comparable with the situation presently before this court.

The distinguishing and alarming fact is that in the instant case there is an individual with the sole, unrestrained and unlimited power to:

(1) Call before him any persons "supposed to be cognizant of any facts or to have means of knowledge in relation to the matter concerning which an examination is required to be made." (R. C. 3737.09)

(2) Summon and compel the attendance of such witnesses to testify to any matter which is proper subject of inquiry. (R. C. 3737.11)

(3) Arrest and charge a witness against whom, in his opinion, there is sufficient evidence to charge with the crime of arson.

(4) Summarily punish by fine or commitment to the county jail any wtiness who refuses to be sworn or to testify. (R. C. 3737.12 and 3737.99)

This individual, the fire marshal, has the sole power to determine the nature and extent of the questions, the time, place and duration of the examination, what documents are to be produced, what constitutes disobedience of an order, what constitutes failure to produce documents, and what constitutes contemptuous conduct. Couple all this power with the power to arrest and charge a person of the crime of arson if in *his opinion* there is sufficient evidence, and the magnitude of the investigatory powers of the fire marshal become apparent and indeed appalling.

(B) Private Hearing.

Revised Code 3737.13 permits the fire marshal to exclude everyone other than those required to be present. As interpreted by the Ohio Supreme Court, this means only the "accused" or the witness and the marshal himself, the only requirement being that the testimony be "reduced to writing". (R. C. 3737.09) The marshal may or may not have the testimony transcribed verbatim, it being only necessary that he or someone "reduce" the testimony to writing.

Section 3737.13 must be read in conjunction with the other pertinent sections of this chapter; that is, Sections 3737.08, 3737.09, 3737.10, 3737.11, 3737.12, and 3737.99 to determine not only the nature of the proceedings but the effect of permitting the fire marshal to conduct such an investigation which is not a hearing when declared to be "private".

This Honorable Court's findings in the cases of *In Re Murchison,* 349 U. S. 133, 99 L. ed. 942, and *In Re Oliver,* 333 U. S. 257, 92 L. ed. 682 readily point out the unconstitutionality of such statutes which permit one to summarily commit a citizen in a manner set forth in Chapter 37 of the Ohio Revised Code. It is not the contention of the petitioners that a hearing cannot be declared secret or private and thereby exclude members of the public. However, when the power granted to the fire marshal is such that the witness can be summarily punished and confined for the numerous items designated in R. C. 3737.12, how can the "hearing" be private without denying him the rights guaranteed under the due process clause of the Constitution?

The following language appears in the opinion delivered by Mr. Justice Black in the case of *In Re Oliver,* 333 U. S. 257, 92 L. ed. 682:

> "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."
>
> "* * * no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches."

The above quotes had specific application to a petitioner who had become accused and summarilly confined for contempt under authority identical to the authority granted the Ohio fire marshal. In the instant case, the petitioners were not sworn nor did they testify, but they were summarily confined. The petitioners' objection to being sworn and to testify was solely on the basis that the hearing had been declared "private", to the extent that even their

counsel was not permitted to be present. If Section 3737.13 is to be constitutional in the light of Section 3737.12 and Section 3737.99, definite provisions protecting the witnesses must clearly be inserted.

Had the petitioner in the case of *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 questioned the statute granting the judge-grand jury the right to secretly question him in chambers rather than the statute of commitment, would this court's answer have been different?

It would appear to make no difference whether one were to attack the statute permitting commitment or the statute permitting the investigator to secretly question the witness having at his disposal the power to summarily commit.

The state of Ohio is required to comply with the supreme law of the land, providing the citizens of its state the justice and fairness in proceedings that such citizens could expect and would be entitled to in any other state, and it is strongly urged that R. C. Section 3737.13 is repugnant to the concepts of procedural due process. This writer is not contending that the cure-all to the proceedings of the fire marshal is to designate that such proceedings must be public. However, it appears fundamental that the minimum would be that said witness would be entitled to assistance by counsel.

Respectfully submitted,

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ERNEST B. GRAHAM and
JAMES F. GRAHAM,

Of Counsel,
Attorneys for Petitioners-Appellants.

APPENDIX A.

Ohio Revised Code Section 3737.08.

The fire marshal, the chief of the fire department of each municipal corporation in which a fire department is established, the mayor of each village in which no fire department exists, and the township clerk of each township without the limits of a municipal corporation, shall investigate the cause, origin, and circumstances of each fire occurring in such municipal corporation or township by which property has been destroyed or damaged, and shall make an investigation to determine whether the fire was the result of carelessness or design. The investigation shall be commenced within two days, not including Sunday, if the fire occurred on that day. The marshal may superintend the investigation.

An officer making an investigation of a fire occurring in a municipal corporation or township shall forthwith notify the marshal, and within one week of the occurrence of the fire shall furnish him with a written statement of all facts relating to its cause and origin and such other information as is required by forms provided by the marshal.

In the performance of the duties imposed by sections 5737.01 to 3737.28, inclusive, of the Revised Code, the marshal and each of his subordinates, at any time of day or night, may enter upon and examine any building, or premises where a fire has occurred, and other buildings and premises adjoining or near thereto.

Ohio Revised Code Section 3737.09.

If in the opinion of the fire marshal further investigation is necessary, he, or an assistant fire marshal, shall take or cause to be taken testimony on oath of all persons

supposed to be cognizant of any facts, or to have means of knowledge in relation to the matter concerning which an examination is required to be made, and cause such testimony to be reduced to writing.

Ohio Revised Code Section 3737.10.

If the fire marshal or an assistant fire marshal, is of the opinion that there is evidence sufficient to charge a person with arson or a similar crime, he shall arrest such person or cause him to be arrested and charged with such offense. Such marshal or assistant shall furnish the prosecuting attorney such evidence, with the names of witnesses, and a copy of material testimony taken in the case.

Ohio Revised Code Section 3737.11.

The fire marshal or an assistant fire marshal may summon and compel the attendance of witnesses to testify in relation to any matter which is a proper subject of inquiry and investigation, and may require the production of any book, paper, or document.

Ohio Revised Code Section 3737.12.

The fire marshal or an assistant fire marshal may administer an oath to any person appearing as a witness before him. No witness shall refuse to be sworn or refuse to testify, or disobey an order of the marshal, or of an assistant marshal, or fail or refuse to produce a book, paper, or document concerning a matter under examination, or be guilty of contemptuous conduct after being summoned by such officer to appear before him to give testimony in relation to a matter or subject under investigation.

Ohio Revised Code Section 3737.13.

Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other

than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined.

Ohio Revised Code Section 3737.99.

(A) Whoever violates section 3737.12 of the Revised Code may be summarily punished, by the officer concerned, by a fine of not more than one hundred dollars or commitment to the county jail until such person is willing to comply with the order of such officer.

APPENDIX B.

Michigan Statute—Section 28.943.

Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

Michigan Statute—Section 28.945.

Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: *Provided*, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 14

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

APPELLEE'S BRIEF

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SUPREME COURT OF THE UNITED STATES

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No. 14

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN

APPELLEE'S BRIEF

Statement of the Case

The statement of the case set forth at page 7 of the Appellant's Brief is substantially correct with one notable exception. To the statement of fact must be added the following:

> "However, the Appellants were not incarcerated but were released upon bond prior to their incarceration so that the very question presented herein could be litigated. In fact, they have never been incarcerated, but have continuously, since March 1, 1954, had their complete freedom so that the right of their counsel to be present during this investigative hearing could be determined."

Question

The Appellee agrees that the question before this Honorable Court is as set forth at page 6 of the Appellants' Brief as follows:

> "*Does the fire marshal's power to declare the hearing before him 'private' and to deny appellants' request for*

counsel deny the appellants due process of law as guaranteed by the XIV Amendment to the United States Constitution?"

Appellee would particularly like to stress that sentence which appears at page 3 of Appellants' Brief in which they state:

> "The only statute drawn in question as being invalid on the ground of its being repugnant to the Constitution was Ohio Revised Code Section 3737.13."

That section provides:

> "Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The Appellee would also like to concur in, and emphasize, the Appellants' statement, at page 5 of their brief, that "the question as to fire marshal's right to summarily commit has not been raised * * *."

At the possible risk of belaboring this Honorable Court, Appellee believes it incumbent to clearly point out that the issue presented herein as to the presence of counsel, as set forth by the Appellants, arose in conjuncton with the appearance, swearing, and testifying of the Appellant witnesses before an administrative official, and *not* in conjunction with the commitment of the Appellants to the county jail.

Directive of the Court

In postponing consideration of the question of jurisdiction to the hearing of the case on the merits, this Honorable Court requested that the parties discuss "this Court's jurisdiction to consider any questions raised by the possible applicability of *In re Murchison,* 349 U.S. 133, and *In re Oliver,* 333 U.S. 257, to the proceedings involved in this case."

The case of *In re Oliver,* supra, concerns itself with the question of whether a one-judge Grand Jury has the right to summarily punish a witness for contempt, and since it had been held that he did not, the case of *In re Murchison,* supra, was concerned with the question as to whether that same judge could hear the contempt proceeding.

If the question herein were the question of the right of the fire marshal to incarcerate the recalcitrant witnesses, the doctrines announced in *In re Oliver* and *In re Murchison,* supra, might well apply. Those doctrines do not, however, apply to the case at bar on its facts, since the question to be determined here is *not* the question of the right to counsel in a contempt proceeding. In fact, the Appellants herein were so ably represented in the matter of the contempt that, prior to their appearance before the Sheriff for incarceration, their bond had been set and a journal entry effecting their release had been filed.

The applicability of the decision of this Court pronounced in *In re Oliver,* supra, is clearly determined by the majority opinion of the Court in that case when it stated, as reported at 333 U.S. 257, page 265:

> "Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding."

As pointed out by Appellants at pages 3, 5, and 6 of their brief, referred to supra, the question before this Honorable

Court is *not* the right to counsel as a defendant in a contempt proceeding, but the petitioners' rights as a *witness* in a secret arson investigation. When the witnesses demanded the presence of counsel during the investigation itself, and then refused to take an oath in the absence of counsel, the issue to be determined herein was joined, and the commitment of the witnesses, which did *not* result in their incarceration, was the vehicle by which the issue already joined could be litigated.

The sole issue before this Court for determination is the constitutionality of the section enacted by the Ohio Legislature which gives to an administrative official the right to conduct his investigations in private so that the law enforcement powers of the state fire marshal to investigate the origin of fires shall not be hampered by persons not required to be present. It is respectfully submitted that the doctrines of *In re Oliver* and *In re Murchison,* supra, are not in derogation of, nor do they detract in the slightest degree from, that legislative grant of authority to an administrative official.

Argument

Appellants' Brief, at page 8, correctly points out that:

> "* * * Not only does the Sixth Amendment apply solely to the federal government, but also the investigation of the fire marshal admittedly is not a 'criminal prosecution' and the appellants are not 'accused' within the language of said amendment. Clearly, the right to counsel is by no means absolute, but if such right exists, excluding the Sixth Amendment, such right must necessarily be derived from the 'due process' clause of the XIV Amendment. * * *"

There are many definitions of the phrase "due process of law", some of which are set forth in Appellants' Brief,

but in order to determine whether an individual has been deprived of life, liberty, or property without due process of law, the circumstances of each transaction must be examined. In the case at bar, Appellants were summoned before an administrative official conducting an arson investigation. They presumably consulted with counsel prior to their appearance, since they were accompanied by counsel. As pointed out above, they were ably represented by counsel from the time they refused to be sworn in the absence of counsel. They have not been deprived of their liberty, and they were afforded an open hearing on the issue of their right to counsel. Thus it cannot be said that they have been denied due process of law because they were denied the assistance of counsel.

Appellants advance the argument, however, that compelling them to be sworn or to testify in this investigation without the presence of counsel would be a denial of due process of law. The Appellants fail to recognize the distinction between an investigation and a hearing. This distinction is recognized in numerous cases including the case of *Bowles* v. *Baer,* reported in 142 Federal (2d) 787, decided by the United States Circuit Court of Apepals of the 7th Circuit on May 25, 1944. The facts of that case arose from an investigation similar in nature to that under consideration in the instant case in that the price administrator, under the provisions of the Emergency Price Control Act of 1942, ordered the defendants to appear without attorneys and without a court reporter for a private investigation by the price administrator. The court in its opinion clearly pointed out the distinction between hearings and investigations. The court stated that investigations are, in effect, informal proceedings held to obtain information to govern further action and they are not proceedings in which action is taken against anyone. On the other hand,

hearing contemplates parties, a determination of the law and facts at issue, and a conclusion whereby the right of such parties may be affected. In the latter case, that is, of hearings, parties are entitled to have their attorneys present.

In effect, an investigation by an administrative body is akin to the investigations conducted by Grand Juries. See *Genecov, et al.* v. *Federal Petroleum Board,* 146 Federal (2d) 596. Certiorari denied 65 S. Ct. 913. Grand Jury investigations have for years been conducted in secret and the testimony there elicited becomes the basis, perhaps, for further action. This is not violative of the Fourteenth Amendment of the Constitution of the United Staes. See *United States* v. *General Supply Association, et al.,* 34 Federal Supplement 241. The court in that case referred to that part of the Fifth Amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury. The court then stated:

> "That is the only constitutional guaranty regarding the Grand Jury. After the presentment or indictment other guarantees come into play. The accused has then a right to an open trial, to confront the witnesses, to have the assistance of counsel, and trial by jury. These provisions, however, do not affect the deliberations of the Grand Jury."

Instead they contend that Section 3737.13, Ohio Revised Code, is unconstitutional because it contravenes the Fourteenth Amendment of the United States Constitution. This particular section provides only the manner in which the state fire marshal may conduct his investigations. This section, in and of itself, can in no way affect the Appellants'

liberty or deprive them of any property. While it is true that if the testimony of a witness before this investigative hearing produces some evidence that a crime has been committed, that evidence would be presented to the Prosecuting Attorney and in turn would be presented to the Grand Jury, which might return an indictment and thus lead to a criminal trial of an accused, it is these very steps which make up the concept of due process of law in our system of jurisprudence relating to criminal offenses. It is certainly furthering the scope of the Fourteenth Amendment to attempt to extend it to permit a witness before an investigative hearing to be represented by counsel.

While the protective mantle of the Fourteenth Amendment is very broad, surely it cannot be said to extend to the presence of counsel for a *witness* during an investigation to determine whether or not a crime has been committed or whether charges should be preferred. If it is so broadened, the power of all law enforcement agencies to investigate crime will be wholly abrogated. An investigation is designed to obtain information to govern further action by administrative personnel. The most formalized investigation is that conducted by a Grand Jury; these have traditionally been cloaked with secrecy, and witnesses are not entitled to have their counsel present. Can this be only less true of this investigation which is one step farther removed from a Grand Jury proceeding?

It should be emphasized at this point that the Appellants, during the fire marshal's investigation, refused even to be sworn.

There is nowhere in the law interpreting the Fourteenth Amendment of the United States Constitution any provision or holding which would protect a person refusing to take an oath because his counsel is not present. In fact, the United States Circuit Court of Appeals for the 9th Circuit

in *Goodman* v. *United States,* reported in 108 Federal (2d) 516, specifically held that even compelling a witness to take an oath of secrecy prior to his testifying before the Grand Jury does not violate either the Fifth or Sixth Amendment of the United States Constitution nor does it deprive him of life or liberty without due process of law.

The opinion as reported in the case of *In re Black,* 47 Federal (2d) 542, has a very distinct statement which sets forth the rights of a person when he is called as a witness. This case arose on the specific question of a right of a witness to be accompanied by counsel in a Grand Jury proceeding. In that case the Court stated, at page 543:

> "* * * The appellant insists that, before a witness is compelled to testify before a grand jury, he should be apprised of the subject-matter of the inquiry or the name of the persons against whom the inquiry is addressed, *and that he should not be called upon to go unaided by counsel to an inquiry which is unlimited in scope and for which he is entirely unprepared.* But the privilege of a witness against self-incrimination is personal. *Neither at a trial nor before a grand jury is he entitled to have the aid of counsel when testifying.* It is hard to see then why he must be warned of the nature or extent of the testimony which is likely to be called for. A witness is not entitled to be furnished with facilities for evading issues or concealing true facts. * * *" (Emphasis added)

This same principle was followed in *United States* v. *Blanton,* 77 Fed. Supp. 812.

Conclusion

It is therefore respectfully submitted that in view of the above, a person who appears for the purpose of answering

questions in an investigation by an administrative body does not have the right to have counsel with him at all times. An administrative investigation is similar in nature to a Grand Jury investigation and it is only if charges should subsequently be brought against a person that it can be said that the Fourteenth Amendment of the Federal Constitution requires that the person be allowed counsel at his side.

Even if Petitioners-Appellants' right to counsel before an administrative investigation is sustained, it should be pointed out to this Honorable Court that question is premature. This is because the Petitioners-Appellants even refused to take an oath on the sole grounds that they wanted their attorneys present.

It is therefore respectfully submitted that the Fourteenth Amendment does not require that Petitioners-Appellants have the right to counsel for the purpose of taking an oath.

Respectfully submitted,

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Attorneys for Appellee.

(2085-0)

SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1956.

In the Matter of the Petition for a Writ of Habeas Corpus for Harry A. Groban and Nathan Groban, Appellants.	On Appeal From the Supreme Court of the State of Ohio.

[February 25, 1957.]

Mr. Justice Reed delivered the opinion of the Court.

The question presented by this appeal is whether appellants had a constitutional right under the Due Process Clause of the Fourteenth Amendment to the assistance of their own counsel in giving testimony as witnesses at a proceeding conducted by the Ohio State Fire Marshal to investigate the causes of a fire.

After a fire occurred on the premises of a corporation owned and operated by appellants, the Fire Marshal started an investigation into the causes of the fire and subpoenaed appellants to appear as witnesses. The Fire Marshal refused to permit appellants' counsel to be present at the proceeding, relying on § 3737.13 of the Ohio Code, which provides that the "investigation may be private" and that he may "exclude from the place where . . . [the] investigation is held all persons other than those required to be present . . . ."[1] Appellants declined to be sworn and testify without the immediate presence of their counsel who had accompanied them to the hearing. Their refusal was treated as a violation of § 3737.12, which provides that "no witness shall refuse to be sworn or refuse to testify . . . ." Section 3737.99 (A) provides that "whoever violates section 3737.12 . . . may be summarily punished, by the officer concerned,

[1] Page's Ohio Gen. Code, 1954, § 3737.13.

by . . . commitment to the county jail until such person is willing to comply with the order of such officer." The Fire Marshal accordingly committed appellants to the county jail until such time as they should be willing to testify.[2] Appellants' application for a writ of habeas corpus was denied by the Ohio Court of Common Pleas, and this denial was affirmed on appeal by the Ohio Court of Appeals and by the Ohio Supreme Court.[3]

We postponed further consideration of the question of jurisdiction to the hearing on the merits. 351 U. S. 903. The Ohio Supreme Court construed § 3737.13 to authorize the Fire Marshal to exclude appellants' counsel from the proceeding. Since appellants' attack is on the constitutionality of that section, we have jurisdiction on appeal. 28 U. S. C. § 1257 (2).

We note at the outset that appellants explicitly disavow making any direct attack on the Fire Marshal's power of summary punishment under § 3737.99 (A). They challenge not the validity of the procedure by which they were committed to jail, but the constitutional sufficiency of the grounds on which they were so committed. Their sole assertion is that the Fire Marshal's authority to exclude counsel under § 3737.13 was unconstitutional because they had a right, under the Due Process Clause, to the assistance of their counsel in giving their testimony.

It is clear that a defendant in a state criminal trial has an unqualified right, under the Due Process Clause, to be heard through his own counsel. *Chandler* v. *Fretag*, 348 U. S. 3. Prosecution of an individual differs widely from administrative investigation of incidents damaging to the economy or dangerous to the

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[2] Appellants were released on bond and have never in fact been incarcerated.

[3] *In re Groban*, 164 Ohio St. 26, 128 N. E. 2d 106.

public. The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to "determine whether the fire was the result of carelessness or design," and to arrest any person against whom there was sufficient evidence on which to base a charge of arson.[4]

The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel,[5] nor can a witness before other investigatory bodies.[6] There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination.[7] U. S. Const., Amend. V; Ohio

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[4] Page's Ohio Gen. Code, 1954, §§ 3737.08, 3737.10.

[5] *In re Black*, 47 F. 2d 542; accord, *United States* v. *Blanton*, 77 F. Supp. 812; see *United States* v. *Scully*, 225 F. 2d 113, 116.

[6] *Bowles* v. *Baer*, 142 F. 2d 787; *United States* v. *Levine*, 127 F. Supp. 651. Note, Rights of Witnesses in Administrative Investigations, 54 Harv. L. Rev. 1214, 1216–1217.

[7] Cf. *Ullman* v. *United States*, 350 U. S. 422; *Hoffman* v. *United States*, 341 U. S. 479, 486; *Smith* v. *United States*, 337 U. S. 137, 150; *Hale* v. *Henkel*, 201 U. S. 43, 66–67.

Const., Art. I, § 10. See *Adamson* v. *California*, 332 U. S. 46, 52. This is a privilege available in investigations as well as in prosecutions. See *In re Groban*, 164 Ohio St. 26, 28, and 99 Ohio App. 512, 515; *McCarthy* v. *Arndstein*, 266 U. S. 34, 40; *Adams* v. *Maryland*, 347 U. S. 179. We have no doubt that the privilege is available in Ohio against prosecutions as well as convictions reasonably feared. Cf. *Ullman* v. *United States*, 350 U. S. 422, 431. The mere fact that suspicion may be entertained of such a witness, as appellants believed existed here, though without allegation of facts to support such a belief, does not bar the taking of testimony in a private investigatory proceeding.

It may be that the number of people present in a grand jury proceeding gives greater assurance that improper use will not be made of the witness' presence. We think, however, that the presumption of fair and orderly conduct by the state officials without coercion or distortion exists until challenged by facts to the contrary. Possibility of improper exercise of opportunity to examine is not in our judgment a sound reason to set aside a State's procedure for fire prevention. As in similar situations, abuses may be corrected as they arise, for example, by excluding from subsequent prosecutions evidence improperly obtained.

Ohio, like many other States, maintains a division of the state government directed by the Fire Marshal for the prevention of fires and reduction of fire losses.[8] Section 3737.13, which has been in effect since 1900,[9] represents a determination by the Ohio legislature that investigations conducted in private may be the most effective

[8] See National Fire Protection Association Handbook of Fire Protection (10th ed. 1948) 41–45; Annual Report of the Division of [Ohio] State Fire Marshal for 1955.

[9] Ohio Laws 1900, Senate Bill No. 51.

method of bringing to light facts concerning the origins of fires, and, in the long run, of reducing injuries and losses from fires caused by negligence or by design. We cannot say that this determination is unreasonable. The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. And with so weighty a public interest as fire prevention to protect, we cannot hold that the balance has been set in such a way as to be contrary to "fundamental principles of liberty and justice." *Hebert* v. *Louisiana*, 272 U. S. 312, 316. That is the test to measure the validity of a state statute under the Due Process Clause.

Appellants urge, however, that the Fire Marshal's power to exclude counsel under § 3737.13 must be considered in the light of his power of summary punishment under § 3737.99 (A), and they would have us hold that, so considered, his power to exclude counsel was unconstitutional. We held in *In re Oliver*, 333 U. S. 257, that a witness before a one-man grand jury, a judge, could not constitutionally be punished summarily for contempt of the grand jury without being allowed to be represented by his counsel. We see no relation between the premise that appellants could not be punished without representation by counsel and the conclusion that they could not be questioned without such representation. Section 3737.13 may contain a constitutional flaw if it should be construed to authorize the exclusion of counsel while the Fire Marshal determines that a witness has violated § 3737.12 and orders the witness committed. The sole assertion of a constitutional violation that appellants relied upon before the Ohio Supreme Court and the only one open on the record here—the authorization in § 3737.13 of the exclusion of counsel while a witness testifies—is not well founded. We hold that appellants had

no constitutional right to be assisted by their counsel in giving testimony at the investigatory proceeding conducted by the Fire Marshal, and that § 3737.13, insofar as it authorizes the exclusion of counsel while a witness testifies, is not repugnant to the Due Process Clause of the Fourteenth Amendment.

Affirmed.

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Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, concurring.

To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt, such a doctrine of fear can hardly serve as a test, under the Due Process Clause of the Fourteenth Amendment, of a particular exercise of a State's legislative power. And so, the constitutionality of a particular statute expressive of a State's view of desirable policy for dealing with one of the rudimentary concerns of society—the prevention of fires and the ascertainment of their causes—and directed towards a particular situation, cannot be determined by deriving a troupe of hobgoblins from the assumption that such a particularized exercise of power would justify an unlimited, abusive exercise of power.

If the Ohio legislation were directed explicitly or by obvious design toward secret inquisition of those suspected of arson, we would have a wholly different situation from the one before us. This is not a statute directed to the examination of suspects. It is a statute authorizing inquiry by the chief guardian of a community against the hazards of fire into the causes of fires. To be sure, it does not preclude the possibility that a suspect might turn up among those to be questioned by the Fire Marshal. But the aim of the statute is the expeditious and expert ascertainment of the causes of fire. The Fire

Marshal is not a prosecutor, though he may, like others, serve as a witness of the prosecution. In various proceedings, as for instance under some workmen's compensation laws, the presence of lawyers is deemed not conducive to the economical and thorough ascertainment of the facts. The utmost devotion to one's profession and the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect as a constitutional principle that no administrative inquiry can be had *in camera* unless a lawyer be allowed to attend.

The assumption that as a normal matter such an inquiry carries with it deprivation of some rights of a citizen assumes inevitable misuse of authority. For good reasons, and certainly for constitutional purposes, the contrary assumption must be entertained. The potential danger most feared is that it will invade the privilege against self-incrimination in States where it is constitutionally recognized. But that privilege is amply safeguarded by the decision of the Supreme Court of Ohio in this case. We are not justified in invalidating this Ohio statute on the assumption that people called before the Fire Marshal would not be aware of their privilege not to respond to questions the answers to which may tend to incriminate. At a time when this privilege has attained the familiarity of the comic strips, the assumption of ignorance about the privilege by witnesses called before the Fire Marshal is too far-fetched an assumption on which to invalidate legislation.

What has been said disposes of the suggestion that, because this statute relating to a general administrative, non-prosecutorial inquiry into the causes of fire is sustained, it would follow that secret inquisitorial powers given to a District Attorney would also have to be sustained. The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of dif-

ferences of degree is inherent in due regard for due process. We are admonished from time to time not to adjudicate on the basis of fear of foreign totalitarianism. Equally so should we not be guided in the exercise of our reviewing power over legislation by fear of totalitarianism in our own country.

For these reasons I join the opinion of the Court.

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Mr. Justice Black, with whom The Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan join, dissenting.

I believe that it violates the protections guaranteed every person by the Due Process Clause of the Fourteenth Amendment for a state to compel a person to appear alone before any law-enforcement officer and give testimony in secret against his will. Under the reasoning of the majority every state and federal law-enforcement officer in this country could constitutionally be given power to conduct such secret compulsory examinations. This would be a complete departure from our traditional methods of law enforcement and would go a long way toward placing "the liberty of every man in the hands of every petty officer." [1] By sanctioning the Ohio statutes involved here the majority disregards "this nation's historic distrust of secret proceedings" [2] and decides contrary to the general principle laid down by this Court in one of its landmark decisions that an accused ". . . requires the guiding hand of counsel at every step in the proceedings against him." [3]

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[1] James Otis used this phrase in denouncing the Writs of Assistance and General Warrants in his famous argument in *Paxton's Case*. 2 The Works of John Adams (Boston 1850) App. 524.

[2] *In re Oliver*, 333 U. S. 257, 273.

[3] *Powell* v. *Alabama*, 287 U. S. 45, 69.

The Ohio statutes give the state Fire Marshal and his deputies broad power to investigate the cause of fires. These officers can summon any person to appear before one or more of them to testify under oath.[4] They can punish him summarily for contempt if he refuses to answer their questions or if he disobeys any of their orders.[5] They can exclude any person they wish from the examination, including the witness' counsel.[6] After the questioning the Marshal or his deputy can arrest the witness if he believes that there is evidence sufficient to charge him with arson or a similar crime.[7] Any statements taken from the suspect during these secret sessions must be turned over to the Prosecuting Attorney for use in any subsequent prosecution.[8] An "Arson Bureau" is established in the Fire Marshal's office and it is provided with a staff charged with the duty of investigating fires to determine if a crime has been committed. The Fire Marshal and his deputy in charge of the "Arson Bureau" are expressly made ". . . responsible . . . for the prosecution of persons believed to be guilty of arson or a similar crime."[9] The statutory provisions show that the Fire Marshal and his deputies are given the ordinary duties of policemen with respect to "arson and similar crimes."

After appellants' place of business at Dresden, Ohio, burned down, a deputy fire marshal summoned appellants to appear before him with their business records to answer questions about the fire. According to their unchallenged affidavit, the Fire Marshal believed that they had started the fire. Appellants appeared before the deputy with their lawyer, stating that they were willing to tes-

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[4] Page's Ohio Rev. Code, 1953, §§ 3737.11, 3737.12.
[5] *Id.*, §§ 3737.12, 3737.99A.
[6] *Id.*, § 3737.13.
[7] *Id.*, § 3737.10.
[8] *Id.*, § 3737.10.
[9] *Id.*, § 3737.02.

tify fully but only if they could have their counsel present during the interrogation. The deputy informed them that the interrogation would be held in private and refused to admit their lawyer. Under these conditions they refused to testify. The deputy proceeded to hold them in contempt and ordered them imprisoned until they were willing to testify before him in secret. Appellants' counsel was not present at the time they refused to testify nor when they were adjudged in contempt and ordered imprisoned.

Appellants instituted this action for a writ of habeas corpus in a state court of Ohio contending that their imprisonment would be contrary to the Fourteenth Amendment. The Ohio Supreme Court rejected this contention and affirmed the judgments of lower state courts refusing to issue the writ. This Court upholds the decision below, but even on the narrow grounds upon which it chooses to decide the case I think that its holding is erroneous and constitutes a very dangerous precedent.[10] I believe that the judgments below should be reversed because it is contrary to due process of law to imprison appellants for refusing to testify before the deputy Fire Marshal in secret.

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[10] I would also reverse the decision below because appellants were found guilty of contempt and sentenced to jail in a proceeding where they were denied the benefit of counsel. This Court has expressly held that a person charged with contempt has a constitutional right to be heard through counsel of his own choosing at a trial on the contempt charge. *In re Oliver*, 333 U. S. 257. While the majority refuses to act on the denial here by claiming that appellants failed to challenge it in the Ohio Supreme Court or in their appeal to this Court, the record convinces me that the matter has been properly raised for our consideration. When a person is to be imprisoned as the result of a proceeding in which he was denied his constitutional rights, we should not be anxious to conclude that he has failed to raise the constitutional questions in the correct procedural form. Cf. *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393; *Hodges* v. *Easton*, 106 U. S. 408, 412.

A secret examination such as the deputy proposed to conduct is fraught with dangers of the highest degree to a witness who may be prosecuted on charges related to or resulting from his interrogation. Under the law of Ohio it seems clear that any statement allegedly secured from the witness may be used as evidence against him at a preliminary examination to justify his detention, before a grand jury to secure his indictment, and at the formal trial to obtain his conviction.[11] The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his assistants and they all vouch for his story.[12] But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced.[13]

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[11] See generally 15 Ohio Jur. 2d, Criminal Law § 388.

[12] In this respect it is important to note that under the Ohio statutes the Fire Marshal or his deputies may permit such persons as they wish to attend the interrogation.

[13] This has been recognized from ancient times. As it is said in Matthew 18:15–16:

"Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established."

Blackstone many centuries later noted that:

"[The] open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than

The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will. Here it should be pointed out that the Ohio law places no restrictions on where the interrogations can be held or their duration. Exemplifying the abuses which may occur in secret proceedings, this Court has repeatedly had before it cases where confessions have been obtained from suspects by coercive interrogation in secret.[14] While the cir-

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the private and secret examination taken down in writing before an officer, or his clerk. . . . There an artful or careless scribe may make a witness speak what he never meant. . . ." 3 Blackstone Commentaries 373.

And Bentham subsequently pointed out:

"In case of registration and recordation of the evidence, publicity serves as a security for the correctness in every respect (completeness included) of the work of the registrator.

"In case of material incorrectness, whether by design or inadvertence,—so many auditors present . . . any or each of whom may eventually be capable of indicating, in the character of a witness, the existence of the error, and the tenor (or at least the purport) of the alteration requisite for the correction of it." 1 Bentham, Rationale of Judicial Evidence 523 (1827).

[14] See, *e. g.*, *Fikes* v. *Alabama*, 352 U. S. 191; *Leyra* v. *Denno*, 347 U. S. 556; *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Ward* v. *Texas*, 316 U. S. 547; *White* v. *Texas*, 310 U. S. 530; *Chambers* v. *Florida*, 309 U. S. 227. For a discussion of the dangers and abuses arising from the secret interrogation of suspects by police see the report of the American Bar Association's Committee on Lawless Enforcement of the Law. 1 Amer. Journ. of Police Science 575.

cumstances in each of these cases have varied, in all of them, as well as in many others, the common element has been the suspect's interrogation by officers while he was held incommunicado without the presence of his counsel, his friends or relatives, or the public. As was said in a concurring opinion in *Haley* v. *Ohio*, 332 U. S. 596, at 605: "An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations natually engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry." [15] Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders.[16]

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[15] In *United States* v. *Minker*, 350 U. S. 179, the Court, at p. 188, pointed out with regard to proposed examinations by immigration officers that:

"It does not bespeak depreciation of official zeal, nor does it bring into question disinterestedness, to conclude that compulsory *ex parte* administrative examinations, untrammelled by the safeguards of a public adversary judicial proceeding, afford too ready opportunities for unhappy consequences to prospective defendants in denaturalization suits."

[16] It seems wholly improper to "wait and see" in each case whether a witness has been coerced or tricked into giving involuntary statements at the secret interrogation and then to set aside convictions which may be based on such statements. This "abuse-by-abuse" approach fails to give the person interrogated sufficient protection. Usually he has no substantial chance of showing that the one or more interrogators used improper means to elicit involuntary statements from him. Only in the most extreme cases will this Court, or any other, be able to find that statements were made involuntarily in the face of the interrogating officers' testimony that they were spontaneous and freely given. Apparently in Ohio, as in most

A witness charged with committing contempt during the secret interrogation faces the gravest handicaps in defending against this charge. The interrogating officers may assert that he engaged in certain contumacious behavior before them and seek to imprison him. Even when the charges are tried by someone other than his interrogators,[17] the accused's efforts to show that the actual events were not as pictured by the interrogating officers would normally be futile if he could call on no one to corroborate his testimony. And when a witness is deprived of the advice of counsel he may be completely unaware that his conduct has crossed the obscure boundary and become contemptuous. Moreover, executive officers will be somewhat more chary in exercising the dangerous contempt power if their actions are subject to external scrutiny.

I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him.[18] The broader implications of these decisions seem

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jurisdictions, the suspect faces the additional obstacle that his alleged statements are presumed to be voluntary and he has the burden of proving that they were not. See 15 Ohio Jur. 2d, Criminal Law § 387. In the few cases where a person interrogated could prove that his statements were made involuntarily he will still be subjected to considerable expense, inconvenience and unfavorable publicity. More important, he will already have suffered mistreatment at the hands of his interrogators.

[17] Here, of course, the interrogators were authorized to try the charges of contempt which they preferred.

[18] See, *e. g.*, *Powell* v. *Alabama*, 287 U. S. 45; *Chandler* v. *Fretag*, 348 U. S. 3.

to me to support appellants' right to use their counsel when questioned by the deputy fire marshal. It may be that the type of interrogation which the Fire Marshal and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel. It is quite possible that the conviction of a person charged with arson or a similar crime may be attributable largely to his interrogation by the Fire Marshal. The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination.[19]

Looking at the substance of things, the Fire Marshal's secret interrogation contains many of the dangers to an accused that would be present if he were partially tried in secret without the assistance of counsel for "arson or a similar crime." Suppose that at the commencement of a

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[19] This was recognized in *Ex parte Sullivan*, 107 F. Supp. 514. There two persons suspected of crime had been examined by law-enforcement officers in secret without the presence of counsel and had been tricked into making statements which were instrumental in their conviction. At pp. 517–518, the district judge observed: "In view of [*Powell* v. *Alabama*, 287 U. S. 45], to mention but one of many cases, unquestionably Petitioners were entitled to have effective counsel *at the trial*. The question here is how they ever could have had effective counsel at the trial, no matter how skilled, in view of what went on before trial. They were denied effective counsel at the trial itself because of what went on before trial while the defendants were without counsel, and absolutely under the control of the prosecution. . . . One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'" (Emphasis not supplied.)

Also see Jackson, J., concurring in *Watts* v. *Indiana*, 338 U. S. 49, 57.

criminal trial, the judge, acting under statutory authorization, expelled everyone from the courtroom but the prosecuting attorney and his assistants and allowed them to question the accused "privately." After such interrogation the doors were thrown open, the jury recalled, and the jurors given a résumé or transcript of the accused's purported testimony. And then the defendant's lawyer, who had been excluded from the secret examination, was allowed to make such defense as he could. Surely no one would contend that such a proceeding was due process of law. Yet the techniques as well as the end effects of the Fire Marshal's secret interrogation are substantially the same.

It is said that a witness can protect himself against some of the many abuses possible in a secret interrogation by asserting the privilege against self-incrimination. But this proposition collapses under anything more than the most superficial consideration. The average witness has little if any idea when or how to raise any of his constitutional privileges. There is no requirement in the Ohio statutes that the fire-prevention officers must inform the witness that he is privileged not to incriminate himself. And in view of the intricate possibilities of waiver which surround the privilege he may easily unwittingly waive it.[20] If the witness is coerced or misled by his interrogators he may not dare to raise the privilege. Undoubtedly he will be made aware that hanging over his head at all times is the officer's power to punish him for contempt—a power whose limitations the witness will not understand. Furthermore, the Fire Marshal or his deputies would seldom be competent to decide if the privilege has been properly claimed or, even if they wish, to instruct the witness how to make correct use of it.

To support its decision that Ohio can punish a witness for refusing to submit to the Fire Marshal's secret inter-

[20] See, *e. g.*, *Rogers* v. *United States*, 340 U. S. 367.

rogation, the majority places heavy reliance on the practice of examining witnesses before a grand jury in secret without the presence of the witness' counsel. But any surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed.[21] They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officer's misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them.

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[21] All of the cases cited by the majority as authority for the practice before grand juries apparently involved a traditional grand jury. It has been suggested that a state can constitutionally provide for grand juries composed of less than 12 persons. See *In re Murchison*, 349 U. S. 133, 139, 140 (dissenting opinion); *In re Oliver*, 333 U. S. 257, 283, 283–284 (dissenting opinion). Even if this suggestion is correct it certainly does not follow that a state can designate one or more of its law-enforcement officers as a grand jury and constitutionally give them power to compel witnesses to appear and give testimony in secret without the presence of counsel. This point was expressly not considered in *In re Oliver, supra*, at 265. Such power in the hands of law-enforcement officers is equally obnoxious to due process whether they are styled as a grand jury, as fire-prevention officers or simply as policemen.

The majority also relies on a supposed proposition that there is no right to use counsel in an administrative investigation.[22] Here it is relevant and significant to point out that in 1946 Congress specifically required in the Administrative Procedure Act that:

> "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." [23]

In reporting the bill which was substantially enacted as the Administrative Procedure Act the Senate Judiciary Committee unanimously declared:

> "By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure." [24]

And the House Judiciary Committee in reporting the House version of the Administrative Procedure Act stated:

> "The bill is an outline of minimum essential rights and procedures." [25]

Heretofore this Court has never held and I would never agree that an administrative agency conducting an investigation could validly compel a witness to appear before it and testify in secret without the assistance of his counsel.

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[22] The only authorities offered by the majority as support for this proposition are three lower federal court decisions.

[23] 5 U. S. C. § 1005 (a).

[24] S. Rep. No. 752, 79th Cong., 1st Sess. 31.

[25] H. R. Rep. No. 1980, 79th Cong., 2d Sess. 16.

In any event, the investigations authorized by the Ohio statutes are far more than mere administrative inquiries for securing information useful generally in the prevention of fires. Rather, these statutes command action with a view toward the apprehension and prosecution of persons believed guilty of certain crimes. The Marshal or his deputies may compel a person suspected of arson or a similar offense—as appellants apparently were—to appear and give testimony under oath. And as previously indicated any statement elicited from such person may be used as evidence against him. Once testimony has been taken from a suspect the duties of the Marshal and his deputies are not at an end. They must arrest the witness if they believe that the evidence is sufficient to charge him with certain crimes. All testimony taken from him and all other evidence must be turned over to the prosecuting attorney. The Fire Marshal and his deputy in charge of the "Arson Bureau" are specifically made ". . . responsible . . . for the prosecution of persons believed to be guilty of arson or a similar crime." The foregoing clearly demonstrates that the Fire Marshal's interrogation is, and apparently was intended to be, an important and integral part in the prosecution of the persons for arson or a similar crime.[26] The rights of a person who is examined in connection with such crimes should not be destroyed merely because the inquiry is given the euphonious label "administrative." [27]

Finally it is argued that the Fire Marshal and his deputies should have the right to exclude counsel and such

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[26] It seems highly unrealistic to equate this interrogation with a proceeding involving a claim for workmen's compensation.

[27] Nor should they be defeated because the Fire Marshal and his deputies are given other duties besides investigating fires to determine if any criminality is involved. For obvious reasons these other responsibilities do not make the interrogation proposed here any less objectionable.

other persons as they choose so that their "investigatory proceedings" will not be "unduly encumbered." From all that appears the primary manner in which the presence of counsel or the public would "encumber" the interrogation would be by protecting the legitimate rights of the witness.[28] It is undeniable that law-enforcement officers could rack up more convictions if they were not "hampered" by the defendant's counsel or the presence of others who might report to the public the manner in which people were being convicted.[29] But the procedural safeguards deemed essential for due process have been imposed deliberately with full knowledge that they will occasionally impede the conviction of persons suspected of crime.

The majority states that "[w]ith so weighty a public interest as fire prevention to protect," they cannot hold that it violates the Due Process Clause to compel a witness to testify at a secret proceeding. But is the public's interest in fire prevention so weighty that it requires denying the person interrogated the basic procedural safeguards essential to justice? Suppose that Ohio authorized the Chief of State Police and his deputies to inquire into the causes and circumstances of crime generally and gave them power to compel witnesses or persons suspected of crime to

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[28] Perhaps, if a real need could be shown, counsel could be restricted to advising his client and prohibited from making statements or asking questions. And there are other alternatives, much less drastic and prejudicial to the witness than the complete exclusion of his counsel, which might provide satisfactory protection for the witness without unduly impairing the efficiency of the examination.

[29] As Bentham said of criminal proceedings:

"Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 Bentham, Rationale of Judicial Evidence (1827), 524.

appear and give testimony in secret. Since the public's interest in crime prevention is at least as great as its interest in fire prevention, the reasoning used in the majority's opinion would lead to the approval of such means of "law enforcement." In fact, the opinion could readily be applied to sanction a grant of similar power to every state trooper, policeman, sheriff, marshal, constable, FBI agent, prosecuting attorney, immigration official,[30] narcotics agent, health officer, sanitation inspector, building inspector, tax collector, customs officers and to all the other countless state and federal officials who have authority to investigate violations of the law.[31] I believe that the majority opinion offers a completely novel and extremely dangerous precedent—one that could be used to destroy a society of liberty under law and to establish in its place authoritarian government.

No one disputes that Ohio has a great interest in the enforcement of its fire laws. But there is nothing which suggests that it is essential to adequate enforcement of these laws to give the Fire Marshal and his deputies the extreme powers of interrogation which they proposed to exercise here. This method of law enforcement has here-

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[30] See *United States* v. *Minker*, 350 U. S. 179.

[31] The Court's opinion does not deny that secret inquisitorial powers could be given such law enforcement officers. A concurring opinion suggests that the grant of such broad power might be unconstitutional so far as a district attorney is concerned. However if policemen in general can constitutionally subject persons to secret compulsory interrogation, how can it conceivably be said that a district attorney could not? I can see no constitutional means of distinguishing this Ohio fire policeman from any other policeman or law enforcement officer. Any attempted constitutional distinction between these various law enforcement officers would be purely artificial. The constitutionality of the Ohio law authorizing secret interrogation by fire marshals acting as policemen in arson cases should not be rested on a conjecture that such an artificial distinction will be drawn by this Court at some future day.

tofore been deemed inconsistent with our system of justice. As MR. JUSTICE FRANKFURTER said in announcing the Court's opinion in *Watts* v. *Indiana*, 338 U. S. 49, at 54:

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." [32]

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[32] A survey of British law reveals nothing which is equivalent to the type of examination that the Ohio Fire Marshal is allowed to conduct. Official inquiries into the cause of fires are generally made by the police. "[W]hen the police are inquiring into a case, they have no power to compel anyone to give them information; a witness may be compelled to attend a *court* and there give evidence, but before proceedings are actually brought he can refuse to say a word." Jackson, *The Machinery of Justice in England*, 137. And in 1929 the Report of the Royal Commission on Police Powers and Procedure at p. 118 recommended that "A rigid instruction should be issued to the Police that no questioning of a prisoner, or a 'person in custody,' about any crime or offense with which he is, or may be, charged, should be permitted." It is doubtful if any statements obtained by the police by secret interrogation of a suspect would be admitted in evidence in a subsequent trial. See *Rex* v. *Grayson*, 16 Crim. App. R. 7 (1921); 43 Harv. L. Rev. 618; 43 Ky. L. Rev. 403.

In France official inquiries into fires are carried out as part of the general system of investigating crimes. The preliminary investigation is under the control of the public prosecutor and is conducted by the police. They have no authority to examine unwilling witnesses. The interrogation of such witnesses and of suspects is the function

Secret inquisitions are dangerous things justly feared by free men everywhere.[33] They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instru-

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of the *Juge d'Instruction*, who is a judge with legal training. Prior to 1897 he had broad power to examine a witness under oath in secret without counsel. See Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure*, 23 J. Crim. L. & Criminol. 372. In 1882 Stephen commented on these secret proceedings as follows:

> "To a person accustomed to the English system and to English ways of thinking and feeling . . . the French system would be utterly intolerable in England. The substitution of a secret [interrogation] for our open investigation before the committing magistrate would appear to us to poison justice at its source." 1 Stephen, History of the Criminal Law of England 565 (1882).

In response to widespread demands French law was changed in 1897 to grant a witness appearing before the *Juge d'Instruction* the right to counsel. M. Constans, one of the sponsors of the law in the French Senate, said: "The *juge d'instruction* is like other functionaries. He must be controlled. . . . The presence of the lawyer will of itself . . . prevent him from doing anything but his duty." Quoted in Ploscowe, *supra*, at 381. See also Esmein, History of Continental Criminal Procedure (1913); Keedy, *The Preliminary Investigation of Crime in France*, 88 U. Pa. L. Rev. 692.

[33] A leading Italian jurist recently said:

"The right to counsel, without which the right to defend oneself is of no practical meaning, does not exist during the first phase of the criminal process in those systems in which the pre-trial phase is carried out in secret without the presence of defense counsel. This is the phase in which the accused, alone and undefended before the examining magistrate, may be unable to find in his own innocence sufficient strength to resist the effects of prolonged questioning, and in order to put an end to his ordeal may be reduced to signing a confession to a crime he has not committed. Unfortunately, Italian criminal procedure retains this sad inheritance from an era of tyranny, which is unreconcilable with respect for the human personality. . . .

"In criminal procedure as we see it applied, the accused is still an inert object at the mercy of the inquisitor's violence. . . . Held incommunicado during the period of questioning, the accused

ments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea wherever and whenever carried out remains unchanging—extraction of "statements" by one means or another from an individual by officers of the State while he is held incommunicado. I reiterate my belief that it violates the Due Process Clause to compel a person to answer questions at a secret interrogation where he is denied legal assistance and where he is subject to the uncontrolled and invisible exercise of power by government officials. Such procedures are a grave threat to the liberties of a free people.

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is alone with his examiners, without aid of counsel; torture, although formally abolished, has returned under new guises more scientific but nonetheless cruel: the third degree, endless hours of incessant questioning, truth serum." Calamandrei, Procedure and Democracy (Adams transl. 1956) 93–94, 102–103.